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12/15/19

96 - 26262

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

EDWIN L. WEINMAN,  
Plaintiff in Error.

221 I.A. 633

ERROR TO  
CRIMINAL COURT,  
COOK COUNTY.

221 I.A. 633

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

On a trial before the court had March 23, 1920, in which a jury was waived, plaintiff in error was found guilty of contributing to the delinquency of a child, in manner and form as charged in the indictment, and was sentenced on the verdict. A motion has been made by the People to strike the bill of exceptions from the record, and to affirm the judgment.

Defendant was allowed thirty days from April 20, 1920, within which to file his bill of exceptions, and the mittimus was stayed for that time. There was no further extension for the time of filing a bill of exceptions, but on May 19, 1920, the mittimus was again stayed for another thirty days. This did not, of course, operate to extend the time within which to file the bill of exceptions. (People v. Tananevich, 285 Ill., 376.) The trial judge certified to the bill of exceptions on June 17, 1920. There is nothing on the face of the record to show that it was presented before that time. It was filed on the same day. It is on this state of facts that the motion to strike is predicated.

As no order appears of record extending the time for presentation of the bill of exceptions beyond May 20, and the same does not appear to have been presented until nearly one month



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MR. JAMES H. HARRIS

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On a trial before the court had March 23, 1900, in

which a jury was waived, plaintiff in error was found guilty of  
constructive manslaughter of a child, in manner and form  
as charged in the indictment, and was sentenced on the verdict.

A motion was then made by the people to set aside the bill of  
exceptions from the record, and to enter the judgment.

Defendant was allowed thirty days from April 26, 1900,

within which to file his bill of exceptions, and the witness

was ordered to that effect. There was no further extension for

the time of filing a bill of exceptions, but on May 10, 1900,

the witness was again ordered to answer thirty days. This bill

was, of course, signed to extend the time within which to file

the bill of exceptions. (*People v. Harrington*, 222 Ill. 375.)

The trial judge certified to the bill of exceptions on June 17,

1900. There is nothing on the face of the record to show that

it was presented before that date. It was filed on the same day.

It is an established rule that the motion is timely so

provided.

As no other grounds of review extending the time for

presentation of the bill of exceptions beyond May 10, and the same

date not appear to have been presented until nearly one month

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later, the motion to strike must, in accordance with the well established practice, be allowed.

While a stipulation to incorporate into the record said bill of exceptions, instead of the original, is inserted in the record as bound up and transmitted to this court, it is in no way made a part of the record and cannot be considered in connection with the motion.

As no errors are argued or assigned in the brief of plaintiff in error except those that are predicated on said bill of exceptions, there is nothing before this court for consideration, hence the motion to affirm the judgment must also be allowed.

AFFIRMED.

Gridley and Matchett, JJ., concur.



PEOPLE OF THE STATE OF  
ILLINOIS.

Defendant in Error.

vs.

EDWIN L. WEINMAN.

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COCK COUNTY.

221 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On May 3, 1921, we struck the bill of exceptions from the record in the above entitled case, it then appearing therefrom that said bill had not been filed within the time allowed therefor, and as the errors assigned rested entirely on the stricken portion of the record, the judgment of conviction was affirmed. Subsequently plaintiff in error suggested a diminution of the record, claiming that a true state thereof would disclose an order of court extending the time for filing the bill of exceptions beyond the time within which it was filed. Leave was then given to supply the alleged omission and the judgment of affirmance was vacated and a rehearing allowed. The record containing said order is now before us and the People have again moved to strike the bill of exceptions on the ground that the record still fails to disclose jurisdiction of the court to sign said bill of exceptions.

After the rendition of our decision so set aside, the trial court, as appears from the supplemental record, entered an order extending the time for filing the bill of exceptions nunc pro tunc as of the date the order was actually made. It recites that the clerk at the time of the motion for such extension made a minute of the same and of its allowance in a book of the proceedings of the court regularly kept by him from which he made his entries into the journal, and that through misprision the





entire entry in the day book showing such extension was not fully transcribed by him into the journal, and that thereupon the record was corrected so as to speak the truth. There could be no question that such memoranda made and kept by the clerk in the due course of judicial proceedings was sufficient to authorize the nunc pro tunc order. Accordingly the People's pending motion to strike the bill of exceptions will be denied.

The indictment was one for what is designated by the statute as contributing to the delinquency of children. The felony count was waived and the cause submitted to the court on a jury waiver. The misdemeanor count charged defendant with knowingly, unlawfully and wilfully doing certain acts directly tending to render one Gretchen Engelbrecht under the age of 18 years, delinquent. The court found defendant guilty and imposed the sentence of six months in the house of correction.

The only direct evidence of the act complained of was given by the girl who was of the age of 15 years. Her testimony in substance was that while she was sitting on a cottee beside defendant with a little girl in her lap defendant drew her hand over under his overcoat toward his trousers, which she observed were partially unbuttoned, and that she withdrew her hand. He claimed that he took hold of her hand playfully because he supposed she had picked up a pencil he had dropped which was used in a game they and another person were then playing. After the pencil was dropped the other person stepped into an adjoining room to get another pencil, and was apparently absent only a minute or two. The act complained of took place in his brief absence. The room was a parlor of a hotel, conducted by the girl's father, at which all the parties lived. Defendant denied the intent imputed to him, giving the act an innocent interpretation, and there was strong evidence of his reputation for





decency, respectability and gentlemanly conduct.

The girl made no complaint or report of the act for two days, and said she "thought nothing of it," and did not speak of it until she heard another girl, Betty Rhoads, tell her experience with defendant and say that he "tried to put her hand down there." Betty Rhoads did not testify. No direct evidence of her experience was given. It was brought into the case only by hearsay. On that ground a motion was made at the close of the case to strike such testimony from the record, but the court refused so to do on the ground that objection was not made to it when offered; and the People urge here in answer to the assigned error that an objection to testimony will not be considered in this court for the first time. The assigned error, however, does not rest on the overruling of an objection, but upon refusal of the court to strike out inadmissible evidence which, from its rulings and remarks evidently entered into its consideration of the question of guilt. The court is not justified in retaining in the record incompetent testimony, even though it was not objected to, where a motion is made in due time to have it excluded from the court's consideration. And where it appears that inadmissible evidence was given weight and consideration by the court in reaching its findings, as in the case at bar, the refusal to strike it out is fatal error, for which the judgment must be reversed.

It is contended by plaintiff in error that the delinquency of the girl is an essential element of the crime under the statute, and as it was admitted that she was not a delinquent there could be no conviction, and reference is made to two decisions in this court so construing a former statute on this subject. But that statute was repealed by the act under which the indictment was returned. That act now in force was apparently passed to remove the grounds for these decisions and to render a person criminally liable for

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—HAROLD A. JACOBSON, JR., AND WILLIAM ROBERT J. COOPER

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• CONCLUSIVE

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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that an objection to testimony will not be sustained if it is

THE 44th ANNUAL MEETING OF THE AMERICAN SOCIETY OF CLIMATE ENGINEERS

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ing the findings, as in the case of the

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any act knowingly and wilfully done which directly contributes to bring a child under 18 years of age into a state of delinquency as defined in said act.

REVERSED AND REMANDED.

Gridley, P. J., and Merrill, J., concur.

and the other two are also in the same position. The first one is in the same position as the other two. The second one is in the same position as the other two. The third one is in the same position as the other two.

THE OTHER TWO ARE ALSO IN THE SAME POSITION.

THE OTHER TWO ARE ALSO IN THE SAME POSITION.



CHARLES C. O'MALLEY,  
Defendant in Error.

vs.

221 I.A. 633

THEODORE ELLENZ (also known as  
THEODORE HOLZ), MAMIE FIED,  
FRANK FIED, MICHAEL V. KANNALLY,  
MARY KANNALLY, MARY ANNA KAISER,  
LOUISA ROSA KAISER, MARY CLACK  
WARNER, DAVID H. WARNER, PETER  
J. KAISER, PAULINE C. PRIS, and

KATIE OLMANS, individually and  
as executrix of the last will and  
testament of MARGARET LANG, deceased,  
Plaintiff in Error.

APPEAL TO

CIRCUIT COURT,

COOK COUNTY.

STATEMENT OF THE CASE. By this writ of error it is sought to reverse a decree of foreclosure, entered by the Circuit Court of Cook County on November 17, 1916, of an instrument in the form of a warranty deed, dated December 11, 1900, executed and delivered by Marie Elenz in her lifetime to one John Kaiser in his lifetime, and conveying certain premises in Cook County, Illinois, known as No. 334 Vine street, Chicago. It was decreed, inter alia, that said instrument constituted an equitable mortgage upon said premises, securing to the complainant, Charles C. O'Malley, as successor in title to said John Kaiser (deceased), the payment of the sum of \$2,015.30, with interest thereon at 5 per cent per annum from December 11, 1900; that there was due and owing to said O'Malley for principal and interest the aggregate sum of \$3,400.64; that by virtue of said instrument said O'Malley had a valid and subsisting lien upon said premises for said last mentioned sum, together with his costs, and that the rights and interests of the above named defendants in said premises were subject thereto. Pursuant to the decree the premises were sold at a master's sale on January 30, 1917, to James A. O'Callaghan for the sum of \$2500. The master's report of sale and distribution was approved by the court on February 2, 1917, from which report it appears that the



proceeds of the sale were insufficient to pay the amount found due by the decree and that there was a deficiency of \$1887.35.

On May 25, 1920, a motion for a severance was made in this Appellate Court and it was ordered that Lottie Clemens, individually and as executrix of the last will and testament of Margaret Lang, deceased, prosecute the writ of error alone. The original transcript of the record was here filed on November 18, 1919, and on October 26, 1920, after defendant in error had suggested a diminution of the record, a supplemental transcript of record was filed by him.

The original bill to foreclose was filed on April 27, 1904 in the Circuit Court by said John Kaiser as complainant. Nearly three years before, on July 21, 1901, Margaret Lang had filed a bill in said Circuit Court against Kaiser, praying for an accounting and that the legal title to said premises be decreed to be held in trust for her by him and that he be ordered to convey such title to her. This prior cause, after being put at issue, was referred to a master in chancery, who, after hearing evidence, made a report finding in substance that she was not entitled to an accounting from Kaiser; that said instrument of December 11, 1900, from said Marie Elene (mother of Margaret Lang) to Kaiser, was intended as security for \$2018.35 and was in effect a mortgage on said premises. Before said Margaret Lang died, and her executrix, Lottie Clemens, and Lottie Clemens and Mamie Fied, her sole legatees and devisees, were substituted as complainants. The court adopted the findings of the master and entered a decree in conformity therewith on March 21, 1904. From this decree Lottie Clemens, individually and as executrix, and Mamie Fied appealed to the Supreme Court of Illinois, and on October 24, 1904, that court affirmed said decree except as to certain directions as to payment of costs. (Clemens v.

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then proceeds to a detailed examination of the various factors which have shaped the development of the United States, from the early years of settlement to the present day. He discusses the role of the different states, the influence of the various social classes, and the impact of the different political systems. The author concludes by stating that the study of the history of the United States is not only a necessary part of a liberal education, but also a means of gaining a deeper understanding of the human condition.

Kaiser, 211 Ill. 460, 467). After said decision by the Supreme Court John Kaiser, in the present cause, filed on April 18, 1908, his amended bill of complaint against said Katie Clemens, individually and as such executrix, Mamie Fied, Theodore Glens (a son of Marie Glens, deceased), and others, praying for a foreclosure of said premises to satisfy said debt of \$2018.38, together with interests and costs, by virtue of said instrument of December 11, 1900, which the court had decreed was in effect a mortgage on said premises. On September 29, 1908, Theodore Glens, Mamie Fied, and Katie Clemens, individually and as such executrix, filed their joint and several answer to said amended bill, in which they denied that the complainant, Kaiser, was the owner or holder of said alleged instrument of December 11, 1900, denied that any sum was due complainant thereunder, and denied that complainant was entitled to the relief prayed or to any relief. The cause was put at issue, and on July 21, 1909, was referred to a master in chancery to take proofs and report his conclusions.

While the cause was pending before the master and after considerable evidence had been taken, Fred Potthast, on November 9, 1909, filed his petition in said cause, setting up the prior proceedings and alleging that on or about January 29, 1907, he had acquired from said John Kaiser all of the latter's right, title and interest in and to the equitable mortgage of December 11, 1900, and in and to said premises, and that since said date he had been and was the equitable owner and holder of said mortgage and of all of said Kaiser's interest therein and in and to said premises and the subject matter of the cause, and praying that he be substituted for said Kaiser as party complainant and that he be allowed to file a bill in the nature of a supplemental bill against the parties already made defendants.





To this petition the defendants filed an answer. Nearly two years later, on October 13, 1911, there was a hearing on the petition, and the court ordered that Potthast be substituted as complainant in the cause in place of Kaiser and be permitted to prosecute the action in his own behalf and to file his bill in the nature of a supplemental bill. Potthast filed his bill, making substantially the same allegations as were contained in Kaiser's amended bill, setting forth the transfer of Kaiser's interest to him, etc., and alleging that since the transfer of said interest John Kaiser had, in the month of December, 1907, died intestate, leaving him surviving his widow and certain other parties as his only heirs at law and next of kin, and that no administration had been had upon his estate. Said heirs at law were made additional parties defendant, were served and were subsequently defaulted. Subsequently, on January 10, 1913, Potthast filed an amended supplemental bill, making additional allegations, and on April 3, 1913, the defendants, Theodore Glass, Jessie Vied, and Katie Clements, individually and as executrix, filed their joint and several answer thereto. There was a reference made to the same master to take further proofs without prejudice to the proceedings theretofore had or the testimony theretofore taken before him.

After further evidence had been taken before said master as a special commissioner, Charles F. McElroy (defendant in error) on June 16, 1916, filed a petition asking leave to file a bill in the nature of a supplemental bill, setting forth the prior proceedings and alleging that on or about September 17, 1914, said Fred Potthast was duly adjudicated a bankrupt in the District Court of the United States for the Northern District of Illinois, that the Central Trust Company of Illinois was thereafter appointed trustee in bankruptcy of said Potthast's estate, that it had acquired all right, title and interest in



and to said estate, that on or about March 27, 1915, by order of said United States District Court, said Central Trust Company sold and transferred to Hugh O'Neill all right, title and interest which said Petthorst had in and to said equitable mortgage and said premises, and conveyed the same to said O'Neill, and that thereafter, on or about March 29, 1915, said O'Neill sold and conveyed said equitable mortgage and all right, title and interest in and to said premises to said O'Malley. The court granted leave to O'Malley to file his bill and that he be substituted as complainant in place of said Petthorst, but without prejudice to any proceedings theretofore had or evidence theretofore taken, and on July 3, 1915, the defendants, Theodore Weiss, Mamie Weis, Frank Weis, Michael V. Kennelly and Katie Clemens, individually and as executrix, filed their joint and several answer to the bill. Further evidence was taken before said special commissioner, and on July 15, 1916, he was ordered to return into court all testimony taken before him, both as master and as special commissioner, but without his findings of fact or conclusions of law thereon, which he thereafter did. On November 17, 1916, the decree here sought to be reversed was entered by the Circuit Court.





MR. JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

Three points are made and argued by counsel for plaintiff in error as grounds for a reversal of the decree. It is first contended that there is no evidence of O'Malley's interest in the alleged mortgage of December 11, 1900, or that John Kaiser, the original complainant, had ever parted with his interest. The findings of fact contained in the decree are to the contrary, and, after a careful examination of both the original and supplemental transcripts of the record, we think that said findings are amply supported by the evidence.

It is next contended that upon the death of John Kaiser, the original sole complainant, before decree, the action should be revived only by his heir, devisee, executor or administrator, and that, even assuming Fred Fethorst to be an assignee, it could not be revived at his instance. We do not think that there is any merit in the contention. It appears that on January 29, 1907 John Kaiser assigned and conveyed to Fred Fethorst all his interest in and to said mortgage of December 11, 1900, and in and to said premises, and in and to the subject matter of the suit. This was done nearly a year before he died. At the time of his death he had no interest in the premises or the litigation. And, under the established chancery practice, Fethorst, after said assignment and transfer, was entitled to set up his interest in the pending action, and seek to obtain relief, by filing a bill in the nature of a supplemental bill, which he did. (18 Ency. Pl. & Prac. 1120; 20 id. 1035; 2 Daniell's Chan. Pl. & Prac., 6th Am. Ed. \*p. 1516; Smith v. Brittenham, 109 Ill. 340, 348; Marion W. York and Cumberland I. Co., 52 Maine, 82, 107.)

It is lastly contended that the Circuit Court erred in treating the question, as to whether the deed of December 11, 1900, was an equitable mortgage, as having been so adjudicated



in the former action of Wismans v. Kaiser, 111 Ill. 400. As we read the opinion of the Supreme Court in that case we think that that question was there so adjudicated, and we further think that under the evidence in the present case said deed was properly so considered, even if the doctrine of res adjudicata be not applied.

Finding no error in the record the decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.



61 - 25859

MIDWEST COLLECTION BUREAU,  
a corporation,

Appellant,

vs.

STEPHAN GRUTZ, Jr.,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 633

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On September 3, 1919, in the Municipal Court of Chicago, a judgment by confession was entered in favor of the plaintiff, Midwest Collection Bureau, and against the defendant, Grutz, in the sum of \$181.26, on a written instrument dated March 20, 1918, and executed by defendant, wherein he subscribed for, and acknowledged the receipt of, a scholarship in the Page-Davis School (operated by the Page-Davis Company and of which Edward T. Page was then the president) covering a correspondence course in advertising, and wherein he promised and agreed, among other promises, to pay to said Edward T. Page, or his order, the sum of \$10 in weekly installments of one dollar each. In very fine print on the face of the instrument there is contained the clause:

"Fifth, if default is made in the payment of any one of the aforesaid installments when the same becomes due then the certain amount remaining unpaid at the time of such default shall become at once due and payable."

Then follows a clause authorizing the entry of a judgment by confession at any time for such an amount as may then appear to be unpaid, together with costs and \$10 attorney's fees. On September 4, 1918, about a year prior to the entry of said judgment, said Edward T. Page assigned all his right, title, interest, claim or demand in and to said written instrument





to plaintiff.

On September 13, 1919, on defendant's motion supported by affidavit he was given leave to make his defense, said judgment to stand as security. On October 21, 1919, after a full hearing before the court without a jury the issues were found against plaintiff, and judgment was entered against it for costs and from that judgment the present appeal was taken.

Instruments in writing similar to the one here sued upon have previously been considered by this Appellate Court in the cases of Pago v. Hoexter, 213 Ill. App. 229, and Midwest Collection Bureau v. Greenwald, 214 Ill. App. 428, and such instruments were there held to be special contracts and not mere promissory notes. In the latter case it is said (p. 473) that the instrument "is well calculated to deceive any person who might become a party thereto."

In view of the holdings in these cases, and being further of the opinion that the instrument sued upon in the present case is so lacking in mutuality of obligation that no cause of action can be predicated thereon, we have reached the conclusion that the judgment of the Municipal Court was right and should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.



115 - 25886

LEO GOLDSTEIN,  
Appellee,

vs.

ORIENTAL CANDY COMPANY,  
a corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT OF  
COOK COUNTY.

221 I.A. 634

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for an alleged breach of a verbal contract, plaintiff, upon the verdict of a jury in his favor wherein his damages were assessed at the sum of \$100, recovered a judgment against defendant in the Circuit Court of Cook County for said sum. It is sought by this appeal to reverse the judgment on the ground, among other grounds, that the trial court erred in not granting defendant's motion for a new trial because plaintiff did not prove his case by a preponderance of the evidence.

Plaintiff's original declaration consisted of a special count and the common counts. Before judgment plaintiff, by leave of court, filed an amended special count, to which defendant's plea of the general issue theretofore filed was ordered to stand as a plea. It is averred in said count, in substance, that on say 3, 1917, plaintiff, at defendant's request, bargained with defendant to buy of it, and defendant sold to plaintiff, "all of the iron and metal, to-wit, 75 tons, in the basement of the defendant's plant on Austin Avenue in the City of Chicago, say at the price of, to-wit, \$17.50 per ton for columns, shaftings and pipe," to be delivered by defendant to plaintiff and to be paid for by plaintiff on the delivery thereof; that in consideration of plaintiff's offer defendant, on the





day aforesaid, promised plaintiff to deliver said iron and metal to him; that thereafter, on June 4, 1917, in pursuance of said agreement, plaintiff received from defendant a portion of said iron and metal and paid defendant the sum of \$230 therefor, and to that extent said contract was performed; that, although the time for the delivery of the balance of said iron and metal has long since elapsed and plaintiff has always been ready and willing to accept and pay for the same at the price aforesaid, defendant did not deliver the balance of said iron and metal to plaintiff but refused so to do; whereby plaintiff has been deprived of great gains and profits and has suffered great damage, etc.

Plaintiff was a dealer in old iron and junk. There had been a fire at defendant's plant on Austin avenue, Chicago, and some of the machinery and piping had been taken to defendant's place of business on Jackson Boulevard, Chicago, where it had been sorted and the junk thrown into a pile. During the month of April, 1917, plaintiff had a conversation with W. B. Bennett, defendant's engineer, at the Jackson Boulevard place regarding the purchase by plaintiff of the junk there located. Bennett introduced plaintiff to Frank W. Sheriff, an employee of defendant, and further conversation was had regarding the purchase by plaintiff of the piping and junk remaining at the Austin plant. On April 25, 1917, plaintiff paid defendant \$30 and Bennett gave plaintiff the following paper: "Received of L. Goldstein \$30 as deposit on iron to be taken out at \$17.50 a ton." Subsequently plaintiff removed the junk, amounting to nearly 12 tons, from the Jackson Boulevard place, and he also removed several wagon loads of junk from the Austin avenue plant. According to the testimony of Nick Gallo, defendant's



watchman at the Austin avenue plant, plaintiff on one occasion attempted to bribe Gallo with a ten dollar bill so that plaintiff might be allowed to take away a load of junk without having the same weighed, and that he (Gallo) as notified sheriff. Plaintiff denied the attempted bribing. Shortly thereafter, on June 4, 1917, a settlement was made for all the junk that plaintiff had taken away from both places by plaintiff paying to defendant, through sheriff, the sum of \$238. At that time sheriff gave plaintiff the following paper: "Received of J. Goldstein \$238. Total due per weight \$288, less deposit \$50. Balance \$238." The defendant thereafter refused to allow plaintiff to take away any more material. Plaintiff, at the trial, did not claim damages on account of defendant's refusal to allow him to take away the remaining piping and junk, but did claim damages for defendant's refusal to allow him to take away certain iron columns, and the controversy, by admission of plaintiff's attorney, wholly related to said columns.

After the fire at the Austin avenue plant there were left standing 28 iron columns in the basement which had supported the floor above. Plaintiff testified that they were still standing when he took away from the place his last load of junk; that he never got any of the columns; that the defendant was "supposed to take them down;" that according to his estimate they weighed about a ton and a half apiece; and that they were worth from \$25 to \$30 per ton. The president of defendant, V. H. Carlinian, testified that at the time plaintiff was taking away the junk the defendant was keeping said columns for the purpose of using them in the construction of a new building.

The sole basis for plaintiff's claim for damages on defendant's refusal to allow him to take away said columns is





his own testimony, to the effect that shortly after he first viewed the wreck at the Austin engine plant he saw Sheriff and made him a verbal bid for all the iron that was there, viz: "\$17.50 for the pipe and columns, and whatever scrap there was at \$13," and that Sheriff accepted the offer. In these statements plaintiff is flatly contradicted by Sheriff, who testified: "I never had any conversation with plaintiff in which I said that he could have the columns for \$17.50 a ton; we were leaving the columns there at that time, as we contemplated rebuilding the place; \*\*\* I never had a talk with him where I told him he could have all the iron in the basement."

In Kenyon v. Hampton, 70 Ill. App. 80, 82, this Appellate court said:

"If it be said that there were proved circumstances in the case that tended to support appellee's claim, it may be answered that there were as many other proved circumstances that tended quite as strongly to support appellant's version of the contract. It is a familiar rule that a plaintiff must make out his or her case by a preponderance of the evidence. In this case there was a clear failure by the appellee in such regard, and we are bound to hold that the verdict was so manifestly against the preponderance of the evidence as to require us to reverse the judgment. Leaslee v. Glass, 61 Ill. 34."

In the Leaslee case, above cited, it is said (p.99):

"There are very few cases in which a jury should find a verdict for the plaintiff upon his unsupported testimony alone, when that testimony is positively contradicted by the defendant. It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached, and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim."

In Prady v. Chaffee, 163 Ill. App. 242, 246, this Appellate court said:

"An affirmative statement by one witness, not by a flat categorical denial by another, of equal credibility, does not meet the elementary requirement of the law that a plaintiff must make out his or her case by a preponderance of the evidence. \*\* The defendant in error, not having proven her case





by a preponderance of the evidence, and the verdict being against the decided weight of the evidence, it is the duty of this court to reverse the judgment and remand the cause." (Citing cases.)

Under the law of this state, and after a careful consideration of the testimony, we are of the opinion that the plaintiff, Goldstein, did not prove his case by a preponderance of the evidence, and that the trial court erred in not granting defendant's motion for a new trial on that ground. Accordingly, the judgment of the circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Patchett, J., concur.



127 - 25806

PATRICK H. O'DONNELL,

Appellant,

vs.

MACLAY HOYNE and HENRY  
A. BERGER,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

221 I.A. 634

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On August 30, 1916, in the Circuit Court of Cook County, Patrick H. O'Donnell commenced an action on the case against Abu Frank, MacLay Hoyne and Henry A. Berger, defendants, and on the same day he filed his declaration consisting of one count. The summons was served on the defendants Hoyne and Berger, but as to the defendant Frank was returned not found. To said count Hoyne and Berger filed a plea of the general issue. On November 2, 1916, the court allowed them to withdraw their plea and to file a general and special demurrer to said count. On the same day the plaintiff filed by leave of court five additional counts, and on November 2, 1916, MacLay Hoyne and Berger filed a general demurrer to said additional counts. On November 20, 1916, the defendant Frank was served with process, but the record does not disclose that any further proceedings were taken as to him. On September 29, 1919, the court sustained the demurrer of Hoyne and Berger to the original count and to each of the additional counts, and, plaintiff electing to stand by his declaration, entered judgment against plaintiff for costs, and this appeal followed.

In the original count plaintiff, after stating that before and at the time of the committing of the grievances complained of he was a practicing lawyer of good standing and reputation in Chicago and Cook County, avers in substance that on January 1, 1916, and prior and since that date, the defendants conspired to falsely

488 181



accuse and, by means of false and fabricated testimony, to procure plaintiff to be indicated and convicted of conspiracy and of subornation of perjury; that said indictments were to be returned against plaintiff upon the fabricated and perjured testimony of said Frank; that the defendant Hoyne during said times was, and is now, the acting state's attorney of Cook County, and that the defendant Berger was, and is now, an assistant state's attorney of said county; that after the defendant Frank had been paroled from the penitentiary, he was, by Hoyne and Berger, "coerced, intimidated, cajoled and corrupted to give his fabricated and perjured testimony" against the plaintiff to the grand jury of Cook County at the February and March terms, 1916, thereof; that Hoyne and Berger conspired to falsely accuse the plaintiff, and thereby oppress and wholly ruin him and destroy his reputation and law practice, and to that end presented a petition to the Chicago Bar Association seeking, ex parte and without notice to plaintiff, to institute disbarment proceedings against said plaintiff, which petition they afterwards abandoned; that afterwards Hoyne and Berger, conspiring as aforesaid, presented, ex parte, a similar petition to the Supreme Court of Illinois, which petition they afterwards abandoned; that Hoyne and Berger afterwards knowingly permitted and caused the said proceedings taken before the grand juries to be published in divers of the newspapers of Chicago and elsewhere, thereby greatly injuring plaintiff; and that, by means of the premises plaintiff has been greatly injured in his credit and reputation as a practicing lawyer, and otherwise greatly injured, to his great damage, etc.

In their demurrer to said original count, Hoyne and Berger, as cause for demurrer, showed (1) that, it appearing from said count that at the times mentioned said Hoyne was state's attorney of said county, and said Berger was an assistant state's attorney thereof, the acts complained of were performed as judicial





officers and were privileged; and (2) that three separate and distinct acts are complained of in said count and made the basis of the cause of action, viz. (a) the act of procuring false testimony to be given before the grand jury, (b) the presentation by said defendants of a petition to the Chicago Bar Association whereby they sought the disbarment of plaintiff, and (c) the presentation of a petition to the Supreme Court of Illinois whereby said defendants sought to institute disbarment proceedings against plaintiff, and that, therefore, the count is double.

In the printed brief herefiled by counsel for plaintiff no arguments are made that said original count is sufficient in law, but the arguments seemingly have reference to the five additional counts. While we might be justified in treating said original count as having been abandoned, we will say that, in our opinion, the count is bad on general demurrer because it sufficiently appears therefrom that the acts of Hoyne and Berger complained of, even if done maliciously and without probable cause, were performed as judicial officers and are therefore privileged. (32 Cyc. 717; Griffith v. Slinkard, 146 Ind., 117, 121; Parker v. Huntington, 2 Gray (Mass.) 124.) Furthermore, we think the count is bad on special demurrer as being double.

In none of the five additional counts is there any allegation to the effect that, at the time of the committing of the grievances complained of, Hoyne and Berger were respectively state's attorney and assistant state's attorney of said county. The allegations are apparently against them in their individual capacities. In all of said five additional counts it is charged that all three of the defendants maliciously, fraudulently and illegally, and without any reasonable or probable cause therefor, "conspired" to injure plaintiff.

In the first additional count it is averred in substance



that the defendants on February 1, 1916, maliciously and unlawfully conspired to cause to be preferred and returned in the Criminal Court of Cook County an indictment against plaintiff, charging him with the crime of conspiracy to do an illegal act; and that in pursuance of said conspiracy they, on April 10, 1916, maliciously, unlawfully and without probable cause gave, and caused to be given, false, fabricated and perjured testimony to the grand jury, to the great damage of plaintiff, etc.

In the second additional count it is averred in substance that the defendants on February 1, 1916, maliciously and unlawfully conspired to deprive and hinder plaintiff from following and exercising his business and profession as an attorney; and that in pursuance of said conspiracy they, on April 12, 1916, maliciously, illegally and without probable cause gave and caused to be published in the Chicago Daily Tribune the information that the plaintiff had been indicted, to his great damage, etc.

In the third additional count it is averred in substance that the defendants, on February 1, 1916, maliciously and unlawfully conspired to deprive and hinder plaintiff from following and exercising his business and profession as an attorney, and thereby greatly impoverished him, to his great damage, etc.

In the fourth additional count it is averred in substance that on February 1, 1916, the defendants, together with other persons whose names are unknown to plaintiff, conspired to falsely and maliciously, and without probable cause, charge and accuse plaintiff, and to cause him to be charged and accused, of having been guilty of great corruption and other misdemeanors and felonies as a practicing attorney and of having corruptly obstructed the due course of public justice in said Cook County, and that said defendants, in pursuance of said conspiracy, on April 10, 1916, maliciously and unlawfully gave and caused to be given false, fabricated and perjured testimony to the April Grand Jury, to plaintiff's great damage, etc.

In the fifth additional count it is averred in substance that, on the day and year aforesaid, the defendants, together with other persons whose names are unknown to plaintiff, conspired to falsely charge and accuse plaintiff with subornation of perjury





in a certain case wherein plaintiff was representing a defendant charged with a crime under a certain indictment; and that in pursuance of said conspiracy the defendants, on April 10, 1916, maliciously and unlawfully and without any probable cause, gave and caused to be given false, fabricated and perjured testimony to the April Grand Jury, to plaintiff's great damage, etc.

We do not think that any one of the five additional counts states a good cause of action. In Leahy v. Littell, 202 Ill., 551, 554, it is said:

"The unlawful acts done in pursuance of a conspiracy, and not the fact of the conspiracy, are the gist of the cause of action in an action on the case for malicious prosecution. (Donney v. King, 201 Ill., 47; Hamilton v. Smith, 39 Mich., 222.) In the Hamilton case the law governing a charge of conspiracy in a declaration like this is well stated by Graves, J., as follows (p. 230): 'In very ancient times all actions for malicious prosecution were laid, where two or more defendants were involved, with a charge of conspiracy, and this practice is supposed to have been adopted from analogy to the statutory form of the old writ of conspiracy. But the early practice has been long obsolete. The action is not for conspiracy, but is simply an action on the case. The gist of it is not the conspiracy, but the damage to the plaintiff by the wrongful acts of the defendants; and this is equally actionable whether it be the result of conspiracy or not. As matter of pleading the charge of conspiracy is mere surplusage and only entitled to be looked at as a matter of aggravation, and the insertion of the averment of it does not change the nature of the action at all. It is still an action on the case and to be tried and disposed of accordingly.'" (Citing cases.)

In Taylor v. Midwell, 65 Calif., 489, 490, it is said, quoting from the language of Chief Justice Holt, in Bayle v. Roberts, 1. Ld. Raym. Rep., 378:

"An action will not lie for the greatest conspiracy imaginable if nothing be put in execution; but if the party be damaged the action will lie. From whence it follows that the damage is the ground of action."

In Hennara v. Hennara, 217 Mo., 541, 555, the court, after quoting from Cooley on Torts, 2nd Ed., p. 143, to the effect that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy,





would give a right of action, says:

"Hence, it follows that the repeated allegations of conspiracy between these defendants have but little significance, unless in addition there is stated a concrete cause of action."

Examining particularly as to the concrete acts respectively charged in the five additional counts to have been done by the defendants in pursuance of the said alleged conspiracy, we do not find in the third count any mention of any concrete act. In the second count the mere charge, that the defendants maliciously, unlawfully and without any probable cause, gave to, and caused to be published in a Chicago newspaper information that plaintiff had been indicted, does not, we think, sufficiently state a cause of action. In the first, fourth and fifth counts the charge is, in substance, that the defendants maliciously, unlawfully and without probable cause, gave, or caused to be given, false, fabricated and perjured testimony to a grand jury. It is not alleged in any of these counts what the false and perjured testimony so given was, or that plaintiff, as a result of such testimony, was ever indicted or arrested, or if indicted was acquitted of the charge in the indictment. Furthermore, "no action for slander will lie against a witness for what he says or writes in giving evidence in a judicial proceeding, notwithstanding it may be malicious or false; the privilege, that exempts a witness from such action, is absolute; an action of slander will not lie for testimony given in a case, if such testimony is pertinent and material to the subject of inquiry." (McDavitt v. Boyer, 169 Ill., 475, 484.) And it is said in Yoder v. Cole, 232 Pa. St., 309, 311: "Public policy and the safe administration of justice require that witnesses, who are a necessary part of the judicial machinery be privileged against any restraint, excepting that imposed by the penalty for perjury." And it is said in Taylor v. Bidwell, supra: "The averments with respect to the defendants' urging a witness to swear falsely



in the criminal prosecution against the plaintiff do not constitute a cause of action for damages" - citing Smith v. Lewis, 3 Johns. N. Y., 157, and Homar v. Fish, 1 Pick. 441. See, also, Young v. Leach, 27 App. Div. (N. Y.) 293, 296; Sanlap v. Glidden, 31 Maine 435.

Our conclusion is that the judgment of the Circuit Court should be affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

THESE are the names of the persons who have been  
 named in the report of the committee on the subject of  
 the proposed amendment to the constitution of the  
 state of New York. The names are given in the  
 order in which they were named in the report.

THEY ARE:

JOHN W. BROWN, Chairman of the Committee.

JOHN W. BROWN, Secretary of the Committee.

JOHN W. BROWN, Treasurer of the Committee.

JOHN W. BROWN, Member of the Committee.



138 - 22899

PATRICK H. O'DONNELL,  
Appellant,

vs.

NACLAY HOYNE,  
Appellee.

2211A-634

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On May 6, 1916, in the Superior Court of Cook County, Patrick H. O'Donnell commenced an action on the case against MacLay Hoyne charging malicious prosecution. In his declaration plaintiff alleged in substance that the defendant Hoyne on February 9, 1916, at Cook County, Illinois, "did falsely, maliciously and without any reasonable or probable cause whatsoever" charge the plaintiff with having committed subornation of perjury; that defendant upon said charge falsely and maliciously caused and procured the plaintiff to be indicted by the grand jury of Cook County, and caused such indictment to be returned into open court, and caused plaintiff to be arrested and imprisoned; that afterwards on May 1, 1917 "the State Attorney, in and for the County of Cook aforesaid, MacLay Hoyne," refused to prosecute said indictment and caused the order of nolle prosequi to be entered of record thereon; and that by means of the premises plaintiff has been greatly injured in his credit and reputation, etc. and has suffered great damage, etc.

Subsequently the defendant, MacLay Hoyne, filed a general and special demurrer to plaintiff's declaration, in which he set up that it appeared from plaintiff's declaration that he, MacLay Hoyne, the defendant, was State's Attorney in and for said County at the time of the commission of the supposed grievances alleged, and that all the acts and doings of the



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defendant as alleged were privileged.

On September 27, 1919, the court, after hearing arguments, sustained the demurrer and, plaintiff electing to stand by his declaration, entered judgment against the plaintiff for costs and this appeal followed.

We are of the opinion that the actions of the trial court in sustaining the demurrer and in entering the judgment appealed from were correct. In 32 Cyc., 717, it is said:

"A prosecuting attorney, being a judicial officer of the state, is not liable in damages for acts done in the course of his duty, although wilful, malicious, or libellous."

In Townshend on Slander and Libel, 3d ed., par. 277, it is said:

"For whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it."

See also, Griffith v. Blinkard, 146 Ind., 117; Harker v. Huntington, 3 Gray (Mass.) 124.

Accordingly the judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

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48 - 25812

WILLIAM HARRISON,

Defendant in Error,

221 I.A. 634

vs.

IRA W. JOHNSTON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff below sued the defendant to recover \$674.13 upon an account stated for money advanced by the plaintiff.

The defendant in his affidavit of merits denied that the account had been stated, that the amount claimed or any part of it was due, and further, set up that the plaintiff's claim was based on a gambling transaction and therefore void. The case was tried by the court without a jury. It had been begun by attachment. The attachment was dissolved, but judgment was entered upon the merits for the amount of the plaintiff's claim.

The court found the facts to be "that on July 25, 1919, plaintiff and defendant ordered Moyes & Jackson, brokers in cotton, in the City of Chicago, to purchase on the New York cotton exchange, and to charge to plaintiff's account, an option to buy one hundred bales of cotton. That neither plaintiff nor defendant ever intended to exercise said option, but intended to resell before maturity and to settle on the difference in the market price at which purchased and at which sold. That plaintiff and defendant were speculating upon the rise and fall of the market price of cotton; that at the time of entering into said transaction, plaintiff and defendant agreed to share profits and losses equally; that as a result of said transaction a loss of \$1,348.26 was sustained, which plaintiff paid."



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Notwithstanding this finding as to the facts the court held as a proposition of law that the transaction did not come within the inhibition of the statute; that "the consideration thereof was the adjustment of such loss between the plaintiff and defendant;" and the court held "as a matter of law such consideration is a legal consideration."

If we accept the facts as found by the court we think this proposition of law was clearly erroneous as applied thereto. See secs. 130 and 131, chap. 38, Criminal Code.

Defendant in error has not appeared in this court, but we have examined the evidence carefully to ascertain if the finding of fact is justified. This examination discloses that the purchase was not an "option" to buy cotton, but on the contrary, that plaintiff had an account with Keyes & Jackson, who were members of the New York stock exchange; that plaintiff made purchases of cotton through these brokers on an agreement with defendant that he and defendant would share the profits or losses resulting, equally.

The evidence for plaintiff shows only the ordinary transaction in making such a purchase.

The defendant's evidence tending to sustain his plea of an illegal transaction is to the effect that they were "speculating on the market." He says: "The latter part of July I told Harrison that we were both foolish to speculate; that I had lost about \$14,000 the last year. \* \* I had never dealt in it before; cotton was advancing, it was about 34 cts. Mr. Harrison said it was likely to go to 60 cts. a point."

In order to invalidate a contract under the statute it must be proved that neither of the parties intended to deliver the goods, and that both had the intention at the time of making

1. The first part of the report is a general statement of the purpose of the study. This is followed by a brief review of the literature on the subject. The next section is a description of the methods used in the study. This is followed by a presentation of the results of the study. The final section is a discussion of the results and their implications.

the contract that it would be settled on differences. Cutler v. Fartridge, 182 Ill. App., 350; Hartwig v. Booth, No. 24694 Appellate Court, First Branch, not yet reported.

The evidence for defendant falls far short of making this proof. The court entered a proper judgment, although on an erroneous theory. It will, therefore, be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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 Government in the form of a loan of \$100 million  
 which was originally agreed upon in 1945.

The third is the fact that the British Government



57 - 25823

ALFONSE MASIULIS,

Defendant in Error,

vs.

DOMINICK BUDVITIS,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

221 T.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Alfonse Masiulis, the plaintiff below and defendant in error here, brought a suit in attachment against Dominick Budvitis claiming that the sum of \$500 was due to him from the defendant as compensation for procuring a purchaser for certain real estate owned by the defendant. Several statutory grounds for attachment were alleged. The writ of attachment issued and was served on the defendant and also on one Augustus Focus as garnishee. The cause was tried by the court without a jury. The court found the issues against the plaintiff on the attachment but in favor of the plaintiff on the merits of the case and assessed plaintiff's damages in the sum of \$500, for which amount judgment was entered against the defendant. The only assignment argued is that the judgment is against the manifest weight of the evidence.

The plaintiff testified that he had known defendant about two months at the time of the transaction. The defendant told him he wished to sell the property involved and that if he, plaintiff, would get a customer for his defendant would pay him \$500. He further testified that one Servile was present at that time, which was in the morning of the day that plaintiff brought Focus, the prospective purchaser, to the place, and that plaintiff told defendant he had a purchaser for the property but did not introduce the customer to plaintiff. The plaintiff also testified that in a second conversation the defendant promised



him \$500 if he would bring a purchaser for the property and that Gus Focus was present at that time. The plaintiff had just rented a saloon in the building in question from defendant.

Martin Gervila, who also owned a saloon nearby, testified that he was present and heard defendant say, "Some of you fellows could brought a customer on that property. I will give you \$500." That is all he said."

Focus testified that he had known the plaintiff for about two months; that plaintiff told him the place he, the plaintiff, ran as his saloon was for sale; that plaintiff went upstairs and got the owner and introduced the owner to him, the witness; that plaintiff showed him all around the building and asked him \$21,000 for the place; that witness offered \$10,000, but plaintiff said that was too cheap and walked out. He says, "Then we make little by little. I give him eighteen thousand and then he come down to twenty thousand and we make a deal for nineteen thousand. We close up the deal on the first of September. I give him so much deposit. \* \* \*" He further says he did not know Mr. Budvitis at the time and did not know Mr. Masiulis.

Julia Pesos, another tenant of defendant, testifies she was present and heard defendant say to plaintiff, "If you please bring back this man Mr. Focus, who is going to buy my property, I will sell to him." Mr. Masiulis says, 'You know I am so busy I have no time to go.' He says, 'What do you care of that, I give you \$500 in commission if you bring him back.'

The defendant testified that he had sold the saloon to Masiulis for \$300, that he then told Masiulis that he wanted \$20,000 for the whole property, but would let him have it for \$500 less, but that he never offered a commission to anybody and never offered plaintiff a commission, but did offer to sell it to him for \$500 less than twenty thousand which was his price.





The testimony of Focus is somewhat discredited by an affidavit which he made just prior to the closing of the deal in which he states that no party was in any way responsible for the sale of the premises to him and that he had never spoken to plaintiff about the sale of the premises before the contract of sale was entered into.

Several other witnesses also testified regarding statements made by Focus which are inconsistent with his sworn testimony.

The witnesses on both sides were not entirely familiar with the English language and this makes the task of an appellate court in determining where the preponderance of the evidence lies more than ordinarily difficult. In such a case the general rule in favor of the findings of the trial court which saw and heard the witnesses is peculiarly appropriate. The burden of proof was upon the plaintiff. There is a sharp conflict in the evidence. Focus is certainly discredited, but on the other hand there are circumstances tending to corroborate plaintiff and discredit the testimony of defendant. The plaintiff was the only person that defendant can certainly remember having told that the property was for sale, and a preponderance of the evidence indicates that Focus learned this fact from Nasiulis.

Under all the circumstances we are not able to say as in Bergman v. F. D. W. & L. Asen.. 169 Ill. App. 329, and other cases on which appellant relies, that the evidence does not establish plaintiff's case by a preponderance.

The judgment will therefore be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.





112 - 25883

ROBERT J. POLONIS,  
Defendant in Error.

vs.

WEST SIDE HOSPITAL OF CHICAGO,  
a corporation,  
Plaintiff in Error.

ERROR TO  
CIRCUIT COURT,  
COOK COUNTY.

221 T. A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 16, 1918, defendant in error began a suit in assumpsit in the Circuit Court of Cook County against plaintiff in error returnable on the third Monday of September. A declaration was filed on the same day and attached thereto was a copy of the account sued on, and an affidavit of merits setting up the nature of plaintiff's claim, and alleging that there was due to the plaintiff from the defendant, after allowing all just credits, \$1,018. July 31st thereafter, the appearance of plaintiff in error was entered by its attorneys, and on August first the plea of non assumpsit was filed. No affidavit of merits was attached as required by sec. 55 of the Practice Act, Hurd's Revised Statutes, 1919, chap. 110, p. 2285. May 29, 1919, thereafter, on motion of the attorney for plaintiff "default of said defendant is entered for failure to file its affidavit of merits with its said plea, and judgment is entered for the plaintiff and against the said defendant in the sum of \$1,018.00."

July 3, 1919, the defendant made a motion to vacate this judgment, and in support thereof filed certain affidavits in which it set up facts tending to show a good defense on the merits, and that the default and judgment were entered without its knowledge or notice; that the cause was not reached on the calendar, but was taken up and tried ex parte, out of its regular order. These affidavits, however, are not preserved by bill of exceptions.

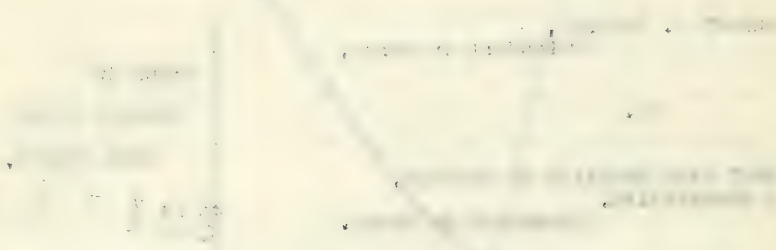


Diagram illustrating the relationship between the variables X and Y.

The diagram shows a series of curves representing the relationship between the variables X and Y.

The curves are labeled with the letters A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z.

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July 16, 1919, the motion to vacate the order of default and judgment was denied by the court. August 9th thereafter, the plaintiff in open court acknowledged payment in full of all damages and costs, and it was ordered that the judgment be satisfied in full of record.

Plaintiff in error argues, first, that it was error to assess damages with plea on file, and second, that it was error to assess damages without notice to the defendant, the appearance of the defendant being on file. The first point raised has been decided contrary to the contention of plaintiff in error in Cramer v. Ill. Com. Men's Assn., 260 Ill. 516, where the court discussing this subject said:

"Counsel call attention to the fact that there was seventeen pleas and the order was in the singular, but it was not necessary to strike the pleas from the files, although such a practice is proper and not uncommon."

In the same case Braidwood v. Weiller, 89 Ill. 606 is quoted with approval. In it the court says:

"The more usual way of taking advantage under the Practice Act of the want of an affidavit of merits accompanying the plea, when the plaintiff, as here, makes an affidavit of his claim, is by motion for a judgment as in case of default, or by motion to strike the plea from the files for want of such affidavit."

And in the more recent case of Firststone v. Ginsberg, 285 Ill. 132, the court says:

"Where an affidavit of merits is insufficient it is proper practice to strike it from the files, and the plaintiff is then entitled to judgment as in case of default. After an affidavit of merits has been stricken from the files, it is not necessary to strike the plea from the files, although the practice is not improper and is common."

The cases cited by plaintiff in error indicate that it has failed to distinguish between those cases in which <sup>an</sup>insufficient affidavit of merits has been filed, and cases where, as here, no affidavit of merits has been filed. Plaintiff in error's first







point, therefore, cannot be sustained.

In discussing the second point our attention is called to rules 20 and 21 of the Circuit Court. These rules, however, like the affidavits mentioned, have not been made a part of the record, and we cannot take judicial notice of them. The record, therefore, fails to show, as in Iowaraystwa v. Barczaitis, 139 Ill. App. 94, on which appellant relies, that the judgment was entered without notice or the case called out of its regular order. It is very doubtful, in view of the language of the Supreme Court in Cramer v. Ill. Com. Men's Assn., *supra*, p. 581, and the opinion of this court in Carerete v. Newton, 211 Ill. App. 494, whether in such case any notice would be necessary.

Moreover, the judgment has been satisfied without objection in open court and the questions raised by plaintiff in error would, therefore, seem to be moot questions.

The judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.



CATHERINE E. McDONOUGH,  
Plaintiff in Error,

vs.

NILSON BROTHERS,  
a corporation,  
Defendant in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

221 L. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in her statement of claim alleged that there was due to her from the defendant, upon an accounting under a written contract, the sum of \$1,347.05. The defendant in its affidavit of merits admitted an indebtedness of \$371.46, but denied that it was liable for any further sum. The case was tried by the court without a jury, and the court entered judgment on a finding for plaintiff of the amount admitted to be due, but refused to find any further indebtedness. The plaintiff, therefore, brings this writ of error.

There does not seem to be any dispute upon any material question of fact.

The defendant was in the steam heating business and E. J. McDonough, the husband of plaintiff, was secretary of the company.

The contract sued on is in writing dated April 9, 1913. By its terms the plaintiff sold and delivered to defendant 96-2/3 shares of the capital stock of the corporation. The total number of shares of stock of the defendant corporation was 300, and by the first clause of the contract it was provided that Nilson Brothers agreed to pay, and plaintiff agreed to accept in full payment for the 96-2/3 shares of the stock, the actual net worth of the said shares of defendant corporation to be ascertained and paid as in the contract set forth.

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The dispute between the parties arises out of the construction of clause 6 of the contract, which is as follows:

"The said Nilson Bros. have heretofore entered into three certain contracts for work in the jobs known as the Beckley Salston Job, the Cook County Hospital Job, and the Katherine Hickey Job. All of these jobs have been turned over to A. J. McDonough Company. The party of the first part at the date hereof, has furnished certain labor and material for and on account of said jobs. It is further agreed that the party of the second part will apply a sum equal to the cost to the party of the first part of all such labor and material delivered to or wrought into said jobs and paid for by the party of the first part upon the purchase price of the shares of stock aforesaid. It is further agreed that the party of the second part will pay to the parties furnishing the same, for all materials delivered to or wrought into said jobs, for which the party of the first part is liable at this time. Such payments to be made within thirty days from the date hereof, and if the party of the second part does not pay the same or all of the same within said time, the party of the first part shall have the right to pay the same, or such part thereof as remains unpaid after thirty days from the date hereof, and to take credit for the amount so paid upon the purchase price of the shares of stock aforesaid."

Before the job was turned over to the McDonough Company Nilson Bros. sent over to the Cook County Hospital job pipe which cost \$1,857.83 and expended for labor on the job the sum of \$775.68. The pipe was not what is known in the trade as "full weight" pipe, which was specified, and with the exception of about \$75 worth of material it was all rejected by the County and was removed. Plaintiff claimed the net loss thereon should be borne by defendant, while defendant contends that under the terms of the contract the loss should be borne by plaintiff.

The plaintiff requested the court to hold the following proposition of law:

"That no material or labor furnished or done by Nilson Brothers in connection with the Cook County Hospital job is chargeable against the plaintiff herein where it appears that such material was afterwards removed, and did not remain in said hospital building and that such labor was done in connection with the delivery or installation of material afterwards removed from said building."

The court refused so to hold, and sustained a motion



the following information is being provided to you:

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will then gather information about the problem and the people involved. This information will be used to determine the cause of the problem and to develop a plan of action.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of maintaining the value of the pound at its pre-war level. This has been due to a variety of factors, including the fact that the Government has not been able to secure the necessary foreign exchange to finance its policy.

of the defendant to find the issues for the defendant as to all amounts claimed in excess of \$371.46 admitted to be due. The errors assigned are based on this holding of the court.

The plain language of the contract seems to be against the contention of plaintiff in error. The intention of the parties to a written contract must be gathered from the language of the instrument where words are unambiguous, as here. Postal Tel. Co. v. U. Tel. Co., 155 Ill. 335; Fowler v. Black, 136 Ill. 372. It was the "cost" of the material and labor, not its value, which by the terms of the contract was to be credited to Nilson Bros. It was the "cost" of "all", not a part of these that was to be so credited, and it was for the "cost" of "all" labor and materials "delivered to or wrought into said jobs and paid for", not such only as might remain therein, that the credit was to be given. There is no ambiguity in this contract.

Moreover, the evidence shows that the fact that this material had been rejected was known to both the parties at the time the written contract was executed. Under these circumstances the ruling of the court was correct and the judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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164 - 25936

BRIDGET DESMOND, Appellee,

vs.

C. S. GORDON, Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below sued for personal injuries claimed to have been sustained by her on May 29, 1917. Her statement of claim alleged that on that date she was walking across Michigan avenue at its intersection with 31st street; that the defendant was then and there driving and operating an automobile along Michigan avenue in a southerly direction; that the plaintiff was proceeding with due care, and defendant disregarding his duty negligently and carelessly drove and operated the automobile, and by reason thereof ran it against the plaintiff injuring her. In another part of the statement it was alleged that defendant's carelessness consisted in driving the automobile at a dangerous rate of speed thereby injuring plaintiff. The affidavit of merits denies the allegations of negligence and denies that plaintiff was in the exercise of due care. The case was tried by a jury which brought in a verdict for plaintiff in the sum of \$750 upon which the court entered judgment.

It is argued by appellant that the verdict is manifestly against the weight of the evidence in the case and this is the only point necessary to consider.

Two witnesses, apparently disinterested, testified that as plaintiff was crossing Michigan avenue at the intersection thereof with 31st street defendant, disregarding signals on the post in the middle of the street to slow up, ran his automobile





at a speed of 35 miles an hour striking the plaintiff who was then crossing the street at that place.

The defendant testified that he was driving at a speed of only 15 miles an hour and says that his machine ran only about 25 feet after striking plaintiff before it stopped. The plaintiff's witnesses testified that the machine ran about 100 feet before stopping. Appellant points out the apparent inconsistencies in the testimony of the witnesses for plaintiff, and says the facts as related by them indicate that the machine was not moving at the speed claimed. Probably it was not, and the testimony of these witnesses to that effect must be regarded simply as their estimates. But defendant admits that he was driving at this crossing at a speed of 15 miles an hour and, we think, on his own testimony it was a question for the jury whether he was guilty of negligence tending to cause plaintiff's injuries.

We have examined the facts as it is our duty to do, but we do not find anything in this record which would justify a reversal of the judgment, and it will therefore be affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

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KATIE A. BELL,  
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,  
CHICAGO CITY RAILWAY COMPANY,  
CALUMET AND SOUTH CHICAGO RAIL-  
WAY COMPANY and SOUTHERN STREET  
RAILWAY COMPANY, operating under  
the name and style of CHICAGO  
SURFACE LINES,  
Defendants in Error.

221 T. A. 635

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This was a personal injury suit. Plaintiff was a passenger on a street car of one of the defendants, operating under the name and style of Chicago Surface Lines, and was injured while alighting therefrom about 10:45 at night.

The declaration is predicated upon the claim that after the car had come to a full stop, for passengers to alight, it was negligently started up while plaintiff was alighting therefrom. On that question of fact there was a clearcut issue. Plaintiff was the only witness in her own behalf on that phase of the case. Her testimony supported her contention, but that of the conductor and two disinterested witnesses, who stood on the platform from which she alighted, supported defendants' claim that plaintiff alighted from the car while it was in motion slowing down for a stop and before it had stopped for her to alight. The jury evidently accepted defendants' theory as to the facts and so rendered their verdict on the merits of the case. We cannot say that the verdict was against the manifest weight of the evidence. On the contrary, there appears to be a clear preponderance of evidence in defendants' favor.

# Figure 1. A map of the study area showing the location of the study site relative to the surrounding area.

Figure 1. A map of the study area showing the location of the study site relative to the surrounding area.



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It is urged by plaintiff in error, however, that she was prejudiced before the jury by the court's sustaining objections to various hypothetical questions, - or to the same question as variously modified, - put by her counsel to a medical expert, calling for his opinion as to the relation of the accident to the injuries complained of. We have examined the questions asked, and while we think the court was amply justified in its rulings, yet, if it were not, it having permitted the hypothetical question, as finally modified and presenting counsel's theory, to be answered, plaintiff got the benefit of the testimony she sought to adduce, and has little ground for complaint. And if the jury believed from the preponderance of the evidence, - which they manifestly did, - that plaintiff's injuries were the result of her own, and not defendants' negligence, then consideration of the points sought to be brought out by said questions, namely, whether her injuries were attributable to the accident, was immaterial. Hence it cannot be said that plaintiff was prejudiced on the main issue of negligence by her counsel's unsuccessful efforts to get before the jury by the questions ruled against, properly or improperly, testimony tending to attribute plaintiff's injuries to a cause for which the jury did not believe defendants were responsible.

Plaintiff in error complains of defendants' given instructions Nos. 2, 7, 9 and 14. Instruction 2 stated correctly the law that a carrier is not an insurer of the absolute safety of a passenger. The instruction is criticised because it did not also lay down the law as to the carrier's duty, which, however, was correctly stated in another instruction. The jury presumably considered the instructions together, and could not have been misled as to the measure of defendants'





duty. Under the circumstances we do not think the giving of the instruction was reversible error.

Instructions 7 and 9, bearing on the state of facts presented by the evidence, have been so frequently given and sustained in similar cases resting on the same charge of negligence, that reference to them is unnecessary.

Instruction 14 related to the duty of plaintiff to use her faculties so as to have avoided injuries on the occasion. Plaintiff contends that it should also have stated the doctrine more fully as to the exercise of care, which however was fully and correctly stated in another instruction. Taking them together, as the jury probably did, the instructions were not misleading or erroneous.

But where it so clearly appears that the case was decided upon its merits and that the jury could not reasonably have rendered a verdict other than what they did, and when, in view of the entire record, substantial justice seems to have been done, it has been frequently held by this court that the verdict will not be set aside because of error in the instructions.

(Feitt v. Chicago City Ry. Co., 113 Ill. App. 301, 393; Heller Chicago City Ry. Co., 209 Ill. App., 140; Ricks Sheep Co. v. Oregon Short Line Ry. Co., 180 Ill. App. 220, 224.)

Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

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work done in the field of the present report

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103 - 25874

ANNIE T. McCUNE,  
Appellee,

vs.

SOVEREIGN CAMP WOODMEN OF  
THE WORLD, a corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 636

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

Plaintiff herein sued as beneficiary of her deceased husband on his beneficiary certificate in the defendant's society and recovered judgment for \$2,000, from which said society appeals.

The certificate was dated April 15, 1912. The insured died by his own hand January 6, 1918. January 2, 1918, he paid to the clerk of the local camp his assessments of \$3.00 each for each of the previous two months. These payments were duly credited to him upon his pass book, receipted for by the clerk without question, transmitted by the latter to the grand lodge, and returned to the local camp by the grand lodge after decedent's death, where they are still held, the beneficiary refusing tender of them. As a part of the proofs of McCune's death the local clerk certified to the grand lodge that at the time of his death McCune was "in good standing" in the society.

It appeared from the evidence that the clerk of the local camp was accustomed in practice to receive dues and assessments of delinquent members, including deceased, and to forward them to the grand lodge without complying with conditions of the by-laws requiring in such cases on payment of arrearages a certificate of good health or an affidavit or other statement, as to facts required by the by-laws, and that the grand lodge kept such payments apparently with knowledge of those conditions

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and without protest, or enforcement of its rules. Mount's pass book showed that he was frequently delinquent in the years 1915, 1916 and 1917, and that his arrearages at such times, and up to his final payments, were received without question in a month or so after they became due.

To defeat the claim appellant relies on its by-laws providing, among other things, that if a member's monthly assessment is not paid the first day of the month following he will stand suspended, and during his suspension his beneficiary certificate is void; that his membership may be restored (1) within ten days from suspension on payment of arrearages only if he is in good health and not addicted to the use of intoxicants or narcotics; and (2) after ten days and within three months only if such conditions precedent are made to appear by a written statement or guaranty thereof; that non-compliance with any of the several conditions precedent will bar recovery; that no officer, etc., has the right or authority to waive any such conditions; that the custom of any camp or its members to the contrary shall not have the effect to waive any such requirements; and that if a member dies by his own hand or act, whether sane or insane, his certificate shall become null and void and of no effect.

It is urged by appellee that in view of the facts above set forth showing that defendant received the dues and assessments of the deceased, as well as those of other members in arrears, without requiring compliance with such provisions of its by-laws, it must be deemed to have waived them, and we think authorities bearing on that subject in this state fully sustain that position. It is enough merely to cite them. (Grand Lodge v. Lockmann, 190 Ill. 140; Court of Honor v. Dinger, 221 id. 176; Jones v. Knights of Honor, 236 id. 113; Bromfield v. Royal Neighbors, 261 id. 60; Walker v. American Order of Foresters, 162 Ill. App. 36; Jones v.

and the other, which is, however, not, as we have seen, the  
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North American Union, 198 Ill. App. 1.)

The by-law which makes a certificate null and void in case of a member's suicide, does not seem to apply after a certificate has been in force for five consecutive years immediately preceding the member's death while in good standing. For another section of defendant's by-laws reads:

"When a beneficiary certificate has been in force for five consecutive years immediately preceding the death, while in good standing, of the member holding the same, the payment thereof shall not be contested on any ground other than that his death was intentionally caused by the beneficiary or beneficiaries, or by the hands of justice, or from the direct result of drinking intoxicating liquors, or from the use of opiates, cocaine, chloral or other narcotic or poison, or shall die while engaged in war except in defense of the United States of America or engaged in a hazardous or prohibited occupation."

Appellant contends that the deceased, being delinquent as aforesaid, stood suspended by operation of the by-laws, and that, therefore, at the time of his death the certificate had not been in force for five consecutive years immediately preceding. This argument, however, falls to the ground if under the doctrine of waiver as aforesaid, he was in good standing at the time of his death, for under the doctrine announced in the case of Monahan v. Fidelity Insurance Co., 242 Ill. 488, there was, under such circumstances, no interruption of the running of the five years.

Hence, as the certificate had been in force from April 18, 1912, and, therefore, for more than five years immediately preceding the member's death, and it was not shown that he met death under any of the circumstances that rendered the certificate contestable, as provided in the by-law last referred to, and as under the doctrine of waiver he was not delinquent or suspended, but in "good standing" at the time of his death, there appears to be no valid ground for contesting defendant's liability. As the evidence was sufficient to sustain the verdict, the judgment will be affirmed.

Gridley and Matchett, JJ., concur.

AFFIRMED.

... ..



VACLAV BUDILOVSKY, Administrator  
of the estate of MARIE BUDILOVSKY,  
deceased,

Appellee,

vs.

ANTON LINHART and JOSEPH LINHART,  
copartners doing business as  
ANTON LINHART AND SON,  
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 636

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Appellee as administrator of the estate of Marie Budilovsky, deceased, brought suit against appellants as owners of an automobile and as common carriers of passengers for hire, to recover for damages on the ground of the negligent operation of said automobile while deceased was a passenger therein, whereby it collided with a street car, causing her death.

While the driver of the automobile testified to the effect that he lost control of it through sudden development of a defect in the steering gear, the evidence was such that the jury might well find that the accident was the result of his negligence in turning, without the exercise of ordinary care for the safety of his passengers, into the track of the street car, with which it collided, when it was so near as to render the collision almost unavoidable.

The automobile was of the limousine type and hired to take six women, including the deceased, to a funeral. On the return from the cemetery they stopped at a restaurant for lunch. It was while driving from there on a north and south street, on which were double tracks of a street car line, that the accident took place. The road was unpaved except between the street car tracks and for about four to six inches beyond the outside rails. The automobile was going





south on the westerly car tracks, and the street car north on the easterly tracks. The evidence tended to show that just before the automobile overtook a wagon, also going south on the westerly tracks, it turned <sup>iron</sup> the westerly to the easterly track when within 50 to 100 feet of the street car that was moving at 12 to 15 miles an hour, and that it continued forward on the latter track and passed by the wagon before the collision took place. At the time of collision the wagon was about 25 feet away. If the jury did not believe the driver's testimony of a defect in the steering gear, then the circumstances disclosed by the evidence were such as to clearly indicate negligence on his part.

For reversal it is urged that there was a fatal variance between the declaration and the evidence, that there was no proof of the joint ownership or control of the automobile, and that there was error in the admission of evidence.

1. The ground of variance is based upon two allegations of the declaration, to the effect that defendants were common carriers of passengers for hire, and that it was their duty to carry the plaintiff's intestate safely and without injury, and upon proof that defendants were private carriers.

With respect to this contention it is enough to say that the allegation with regard to duty is a mere conclusion of law, which, though it does not harmonize with the facts relied on as a breach of duty, does not render the declaration insufficient to sustain the judgment, if it contains, as we think it does, facts sufficient to raise the duty of which a breach is alleged. (C. & A. Ry. Co. v. Clausen, 173 Ill. 100.) The duty, if any exists, must arise from the facts stated. (New Staunton Coal Co. v. Froman, 236 Ill. 354.) As was said in Calkins v. Worth, 215 Ill.



"If the facts alleged warrant the relief and are supported by the evidence, then the mere erroneous conclusion of the pleader, if such there is, as to what relation was created under the facts would not preclude the granting of the relief, or fall within the objection of variance between the allegations and the proof."

Disregarding such conclusion of law as to appellants' duty as surplusage, as we may, and also the word "common" in referring to the carrier, as not essential, the other allegations showing, and evidence tending to show, negligence and a breach of duty, whether the carrier was a private or common carrier, it was unnecessary to prove such allegations, and, therefore, immaterial if the evidence disproved them. (Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 262.) It has been repeatedly held in personal injury cases that it is not necessary to prove immaterial allegations, and that in such actions it is sufficient if a party prove enough of his declaration to make out a case. (East St. Louis Con. Ry. Co. v. Altgen, 210 Ill. 213.) As the rule that proof must correspond with allegation does not apply where the allegation may be stricken out as surplusage without impairing or changing the legal effect of the declaration, we think the contention as to variance is not well founded. As said in Stearns v. Seidy, 135 Ill. 119:

"When the transaction out of which the controversy arises is the same and the substantial cause of damages is the same, the variance is regarded as immaterial and is overlooked."

2. One of the passengers, Magdalena Rudilovsky, testified that "as soon as we got the automobile he (the driver) started to go very fast," and added: "then I said to him, 'don't drive so fast,'" and that the deceased "also kind of turned to him and said 'Don't drive so fast. You can drive us through the parks and then take us home.'" Objection was made to each of these statements, and the court overruled motions to strike them out. The evidence tended to show that these statements were made just after the automobile left the restaurant. Now far that restaurant was from the place







of the accident does not appear. It may have been, for aught the record shows, a mile or more away. It was at least more than 250 feet away, for there was evidence that after leaving the restaurant the automobile crossed a bridge that distance away from the place of the accident and did not turn into the easterly track until later. There was no evidence as to the speed of the car after such remarks were made, or tending to show that its speed was the proximate cause of the accident.

Without fixing time or place, another witness, over objection, was permitted to testify that said Magdalena Radilovsky said to the driver, "Don't run so fast as I didn't make my will yet." None of this testimony was relevant in the absence of a showing that the speed at which the automobile was driven was the proximate cause of the injury. For aught that appears to the contrary the automobile may have slowed down after such remarks of caution were made. Plaintiff manifestly relied on negligence in turning into the track on which the street car was coming when it was so near as to make a collision inevitable. Such testimony, therefore, was clearly prejudicial. The jury may have inferred therefrom that the car was being driven at an excessive and dangerous rate of speed as it turned from one track into the other, and its admission and the failure to strike it out constitute, in our judgment, reversible error.

3. In view of the necessity of reversing the judgment and remanding the cause for a new trial on the ground stated, it is unnecessary to consider at length whether the evidence warranted the verdict against both defendants. There was an attempt to show their joint ownership and control of the automobile in question. It is extremely doubtful whether the evidence so showed. The defendants Anton and Joseph Linhart were father and son respecti-



vely. The former was an undertaker and the latter worked with him in the business of conducting funerals. It was not disputed that Joseph Linhart bought and paid for the automobile, that he applied for and obtained in his own name a state license therefor for the year 1918, when the accident took place, that he obtained from the City of Chicago a limited license, or permit, to use said automobile for the same year for carrying persons for hire, and paid therefor, and that he hired the driver in question and paid him his wages. The driver testified, too, that he never did any work for Anton Linhart, and there was no direct proof that Anton had anything whatever to do with the letting or the ownership or control of the automobile in question. The only evidence tending to show his connection therewith was the existence of the sign "Linhart & Son" at his place of business, from which the automobile was let, - but not by Anton, - and that Joseph was permitted to draw checks in the name of Anton Linhart by himself on the bank in which Anton kept an account in his own name, and that the driver of the automobile in question was sometimes paid his wages through checks so drawn by Joseph. There was no attempt to prove a co-partnership and sharing of profits and losses in the business conducted by Anton Linhart, or in the use of the automobile in question, or that the bank account was in fact used in connection with any partnership transactions. Joseph's use of the bank account was not inconsistent with a mere convenience accorded to him by his father. Under the statute neither of the defendants could testify. The best evidence of their co-partnership was not resorted to. Plaintiff called neither of them to testify, nor for any books or documents, except certain checks, that might throw light on the question of ownership and control of the automobile or limousine in question.





Over objection, plaintiffs were permitted to introduce in evidence checks of other persons shown on their face to have been given "for limousine to cemetery," and made payable to "Mr. Linhart", one drawn in May, 1917, and two in 1916. These checks were not shown to be connected with the limousine in question, and only one of them with Anton Linhart, whose signature was on its back. Connection of the other two checks, if not the one so endorsed, with the question of ownership and control of the limousine in question we deem altogether too remote to warrant their admission without further proof. We think it was error to receive them.

For the errors stated, therefore, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Matchett, JJ., concur.





76 - 26237

PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

EMILIE SMITH,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

221 I.A. 636

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted of a misdemeanor upon trial therefor in the Municipal Court of Chicago. The judgment must be reversed and the cause remanded because, as pointed out and not questioned, there was no proof of venue, which, of course, was essential to establish the court's jurisdiction of the cause.

REVERSED AND REMANDED.

Gridley and Hatchett, JJ., concur.



PEOPLE OF THE STATE OF  
ILLINOIS.

Defendant in Error.

vs.

JOSEPH LINDENMAN.

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 636

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted on an information filed in the Municipal Court of Chicago, charging that he "unlawfully and wrongfully did have in his possession a certain deadly weapon, to-wit, a revolver, without first having procured a written license from the general superintendent of police of said city so to do, in violation of section 1, of Senate Bill 93, in force on and after July 1, 1919."

The information was intended to be based on the act to revise the law in relation to deadly weapons, in force July 1, 1919. (Sess. Laws of 1919, p. 431.)

Section 1 of said act reads:

"It shall be unlawful for any person to carry or possess \* \* \* any black-jack, slung-shot, sand-bag, metal knuckles, bludgeon, or to carry or possess, with intent to use the same unlawfully against another, a dagger, dirk, billy, dangerous knife, razor, stilette or any other dangerous or deadly weapon or instrument of like character."

Section 4 of said act makes it "unlawful for any person to carry concealed upon his person, any pistol, revolver, or other firearm, without a written license therefor," issued as in said section prescribed.

It will be noted that section 1 enumerates two classes of weapons or instruments. It makes the mere carrying





or possession of a weapon of the first mentioned class unlawful, but to be unlawful for one to carry or possess a weapon of the second mentioned class there must be an "intent to use the same unlawfully against another."

Counsel for the People contends that the information can rest upon said section 1 by rejecting as surplusage the words "without first procuring a written license," etc. It is clear that a revolver cannot be included in the first class of weapons so enumerated, - the mere possession of which is made a violation of law - because the statute by section 4 expressly authorizes the carrying, and therefore the possession, of a revolver under conditions therein mentioned. If, however, prosecution was intended for carrying weapons of the second mentioned class, then we think, under the doctrine of ejusdem generis, a revolver, or "firearm" as it is classified in section 4, cannot be deemed a "weapon or instrument of like character" to weapons of that class, not only because they are designed and intended for entirely different uses, but because the statute in section 4 specifically deals with firearms, including revolvers, as a separate class of weapons, and does not prohibit carrying and possessing them under certain conditions.

But mere possession of weapons of the first mentioned class is made a violation of law probably because they are seemingly designed and used solely for unlawful purposes, while possession of those of the second mentioned class is rendered unlawful only when there is an "intent to use the same unlawfully against another." Hence, even if a revolver were intended to be included in the second mentioned class as a deadly weapon yet failure to allege in the information an "intent to use the same unlawfully against another," renders it fatally defective.



If the information was intended to be based on section 4, it is defective for failure to allege the carrying of a revolver by defendant "concealed upon his person," which, as well as the allegation, "without a written license therefor," is essential to a full statement of what constitutes a violation of that section.

It is apparent, therefore, that the judgment of conviction cannot stand (1) because a revolver is not included in that class of weapons whose possession is absolutely prohibited; (2) because if it be included in the second class of weapons mentioned in section 1, the information fails to allege the requisite intent; and (3) because it is not mere possession but the carrying of a revolver concealed on one's person without a written license therefor that is prohibited by section 4.

Accordingly the judgment is reversed.

REVERSED.

Gridley and Matchett, JJ., concur.



174 - 26833

IN RE ESTATE OF ANNA SIUTA,  
deceased,  
On Appeal of KAROLINA LABUDA,  
Appellant,

vs.

ANIELA SIUTA SZYMANKA,  
Appellee.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

221 I.A. 636

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Appellee has moved to strike from the record what is referred to as a "purported bill of exceptions," and to affirm the judgment of the lower court.

There was first filed a short record, and later a supplemental record certified by the clerk to be a complete transcript of the record with the exception of what was contained in the short record. Neither transcript contains a bill of exceptions. While the later transcript, no doubt through misapprehension of the nature of the document, was marked as presented to the trial judge, it is not certified to by him and does not purport to be a bill of exceptions. Nor do the transcripts purport to contain one. There is, therefore, no bill of exceptions to be stricken.

The transcripts improperly recite motions, supported by affidavits, the overruling of which appellant relies on for reversal. But as they are not preserved in a bill of exceptions they cannot be considered, and it will be conclusively presumed that the action of the court was correct. (Commissioners, etc. v. Carroll, 295 Ill. 485, and cases there cited.)





It would have been of no avail to appellant had said motions been preserved by bill of exceptions for it appears that they were made at terms subsequent to that at which the judgment was entered, and that no motion was made whereby the court preserved jurisdiction to those terms.

While said motions and affidavits might on motion therefor be properly expunged from the record such a motion is unnecessary as they cannot in any event be considered. As there is nothing in the common law record upon which the assignments of error can rest the judgment must accordingly be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.



25929  
158 - 25929

DAVID BRONSTEIN,  
Defendant in Error.

vs.

M. PHILIP GINSBURG,  
Plaintiff in Error.

221 I.A. 637

ERROR TO

CIRCUIT COURT,

COOK COUNTY

221 I.A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The defendant, M. Philip Ginsburg, seeks by this writ of error to reverse a judgment for \$1000 rendered against him by the Circuit Court of Cook County, on October 17, 1919, in an action on the case for libel.

The action was commenced on July 3, 1919, against Ginsburg and one Joseph Leibner, and both were served with summons, but the proceedings were subsequently dismissed as to Leibner.

Plaintiff's declaration, which consists of one count, avers in substance that on February 16, 1919, in said county, the defendant, Ginsburg, wickedly and maliciously did compose and publish, and caused to be composed and published, of and concerning the plaintiff, in a certain newspaper, called the "Sunday Jewish Courier", whereof the defendant was then and there the editor and proprietor, a certain false, scandalous and defamatory libel in the Yiddish language, as follows: (here is set forth the article in the Yiddish language); that said words signified and meant in the English language as follows: (here is set forth the English translation thereof); and that by means of the committing of said grievances plaintiff has been and is injured in his good name, credit and reputation, and has suffered great damage, etc.

On September 23, 1919, the defendant, Ginsburg, not





having appeared or filed a demurrer or plea, was defaulted, and subsequently plaintiff's damages were assessed by a jury at the sum of \$1000, and judgment thereon entered.

After the term had passed the defendant appeared and moved the court to set aside the judgment, supporting the motion by affidavits, but the court finally denied the motion.

One of the grounds urged for a reversal is that the declaration is so defective that it cannot sustain the judgment. If this is so, the defect may be taken advantage of on writ of error. (Wilson v. Myrick, 26 Ill. 34, 38; Hipp v. Lichtenstein, 79 Ill. 353, 361.)

We have read the English translation of the alleged libelous article as set out in the declaration. It does not name the plaintiff. And the declaration does not allege facts showing that the article applied and had reference to the plaintiff, or was understood by its readers to refer to him. The declaration is apparently lacking in inducement, and the requirement of an inducement cannot be supplied by innuendoes. (Duvivier v. French, 104 Fed. Rep. 278; McLaughlin v. Fisher, 136 Ill. 111; People v. Reithley, 100 Ill. App. 11.) We do not think that the declaration is sufficient to sustain the judgment. Accordingly, the judgment of the Circuit Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Metchett, J., concur.



167 - 25939

JOSEPH GUGGENHEIM and  
HEEDLE RIVKIN, co-partners,  
as Guggenheim & Co.,

Appellees.

vs.

W. T. GAINES,

Appellant.

APPEAL FROM  
MUNICIPAL COURT

OF CHICAGO.

221 I.A. 637

MR. JUSTICE ORIELLY DELIVERED THE OPINION OF THE COURT.

The plaintiffs sued the defendant, Gaines, in the Municipal Court of Chicago, to recover for the value of certain paints and merchandise sold and delivered during the months of June and July, 1916, claiming \$71.40 to be due and unpaid. The case was tried before the court without a jury resulting in a finding and judgment in favor of plaintiffs for said sum, and defendant appealed.

We have read the evidence as disclosed in the abstract. No useful purpose will be served in discussing it. Suffice it to say that we think that the finding and judgment are fully supported by the evidence, and the judgment is, therefore, affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

Page 1 of 1

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the integrity of the financial system and for the ability to detect and prevent fraud. The document also outlines the responsibilities of individuals involved in the process, including the need for transparency and accountability.

The second part of the document provides a detailed overview of the various methods used to collect and analyze data. It describes the different types of data sources, such as surveys, interviews, and focus groups, and explains how this information is used to identify trends and patterns. The document also discusses the challenges associated with data collection and analysis, such as ensuring the reliability and validity of the data.

The third part of the document focuses on the development of effective communication strategies. It discusses the importance of clear and concise communication and provides examples of how to structure reports and presentations. The document also outlines the key elements of a successful communication strategy, including the need to tailor the message to the audience and to use a variety of communication channels.

The fourth part of the document discusses the importance of ongoing evaluation and improvement. It emphasizes that the effectiveness of any program or initiative can only be determined through regular assessment and feedback. The document also outlines the steps involved in conducting an evaluation, including the selection of appropriate metrics and the use of data to inform decision-making.

Continued

Document ID: 123456789 | Page 1 of 1

176 - 25948

RUDOLPH J. GLUECKLICH, Appellee,

vs.

GEORGE HANGIARAS et al.,

GEORGE HANGIARAS, Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2211 A. 637

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure entered by the Superior Court of Cook County, October 29, 1919, in favor of Rudolph J. Gluecklich, complainant, and ordering that the amended cross-bill of the principal defendant, George Hangeras, be dismissed for want of equity.

On August 12, 1913, one Spiros Christopoulos entered into an agreement in writing with E. W. Kendall, doing a real estate business as E. W. Kendall & Co., in Chicago, for the purchase of the premises in question. The agreement provided for the payment of the purchase price, amounting to \$1,750, in installments viz: \$40 upon the execution of the agreement and the balance of \$1,710 in monthly payments of \$24 or more on the 10th day of each month, and further provided that said Kendall would convey the premises as soon as one-half of the purchase price had been paid, providing that Christopoulos executed a note, secured by a trust deed, for the unpaid balance due on or before three years from the date thereof with interest at 6% per annum, payable semi-annually. Christopoulos made the payments as provided in the agreement, and on April 24, 1916, Kendall caused a deed to be executed by the Chicago Title and Trust Company, as trustee, conveying the premises to Christopoulos, and on the same day Christopoulos, as part of the purchase price





and to evidence the balance then remaining due and payable under the terms of said agreement, executed and delivered to Kendall his note for \$500, payable to the order of himself and by him endorsed, and due on or before three years, with interest at 6% per annum, as evidenced by six interest coupon notes for \$15 each, due every six months thereafter, also executed and delivered to Kendall and payable to the order of Christopoulos and by him endorsed. To secure his payment of said principal note of \$500 and said interest notes Christopoulos on the same day executed and delivered a trust deed conveying said premises to Kendall, as trustee, and said trust deed was recorded. All of the payments made by Christopoulos in pursuance of said agreement were made at the office of Kendall & Co., and on December 26, 1916, Christopoulos caused to be paid, by his friend and agent, Vaniopoulos, at said office, the first interest coupon note of \$15, due October 24, 1916, and said note was then marked paid and cancelled by Kendall & Co. About this time Gluecklich, the complainant, for a good consideration, purchased from Kendall & Co., and became the owner and legal holder of said principal note of \$500, together with the five uncanceled interest coupon notes of \$15 each. Gluecklich ascertained from the books of Kendall & Co., that Christopoulos' address was No. 721 Blue Island avenue, Chicago, and on January 20, 1917, he wrote the following letter to Christopoulos:

"Kindly take notice that I am the holder of the \$500 note executed by you on April 24, 1916, secured by a trust deed of same date on the lots you bought in the Kendall's subdivision, Belmont & 36th Ave., Chicago, and all future payments, including interest, forward to my Joliet address, 108 Whitney Ave. only.

(Signed) Rud. J. Gluecklich  
Joliet, Ills."

Gluecklich testified in substance that he personally enclosed the letter in an envelope addressed to Spiros Christopoulos, at No. 721 Blue Island avenue, Chicago, Illinois, placed a two cent postage stamp thereon and deposited the envelope in a United States



mail box in Joliet, Illinois; that on the upper left hand corner of the envelope was the following: "Jos. Schlitz Brewing Company; after 5 days return to W. J. Gluecklich, Joliet, Ill.;" and that the letter so addressed and mailed was never returned to him, (Gluecklich). Christopoulos testified that he never received said letter or any other letter of similar import; that he never at any time had resided at No. 721 Blue Island avenue, Chicago; that during the years 1916 and 1917 he lived at No. 1436 Park avenue, Chicago; that his friend Apostolopoulos, and another friend, Lukas, resided at 721 Blue Island avenue, Chicago; that he (Christopoulos) was a paddler by occupation; that he could not speak or read English very well; that in his dealings with Kendall & Co., relative to the purchase of said premises and making his payments thereon he frequently sent one of his friends, Nasiopoulos or Apostolopoulos, to act in his stead. The evidence further disclosed that on several different occasions during the year 1916 Christopoulos had received from Kendall & Co. letters addressed to him at No. 721 Blue Island avenue and that he had taken action pursuant to those letters. And Christopoulos further testified on cross examination that Apostolopoulos directed Kendall & Co. to send letters to him (Christopoulos) addressed to 721 Blue Island avenue, and that the arrangement was that Apostolopoulos would hand the letters over to him.

During the month of March, 1917, Christopoulos, and his friend and agent, Nasiopoulos, had negotiations with George Hengiaras, the principal defendant, relative to a sale by Christopoulos to Hengiaras of the premises in question. On March 14, 1917, Nasiopoulos, accompanied by Apostolopoulos and Christopoulos, called at the office of Kendall & Co. for the purpose of paying the principal note of \$300 (which Christopoulos had executed and delivered to Kendall on April 24, 1916) and all interest due, and having the trust deed to Kendall assuring the same released.







Kendall was not then in the office and the negotiations were had with Nickerson, bookkeeper for Kendall & Co. At this time Nasiopulos for and on behalf of Christopoulos paid Kendall & Co. by check the sum of \$509.17, and received a receipt signed by Kendall & Co., per Nickerson, for said amount, itemized as follows "Mtg \$500; interest \$6.67; release deed \$2.80; total \$509.17." But when this payment was made said principal note of \$500, and the five uncanceled interest coupon notes were not then in the office of Kendall & Co., and neither said Nasiopulos nor said Christopoulos at that time or at any subsequent time received said principal note or any of said interest notes. On the same day, March 14, 1917, Nasiopulos met Mangiaras, told him of the payment of the \$500 note and interest, and exhibited to him said receipt, and Mangiaras accepted a warranty deed for said premises executed by Christopoulos, and the same was recorded on March 16, 1917. Nasiopulos testified that at the time Mangiaras received said deed he (Nasiopulos) knew that the trust deed securing said \$500 principal note had not been released; that when he delivered the check for \$509.17 to Kendall & Co., Nickerson told him that E. B. Kendall was very ill but that he (Nickerson) would have the notes and the release deed in a few days; and that was the reason why he (Nasiopulos) closed the deal without the production of the notes or of the release deed. E. B. Kendall afterwards died.

When the second interest coupon note of the \$500 principal note given by Christopoulos fell due on April 24, 1917, it was not paid, or at any subsequent time, and the then owner and holder of said principal note and said five uncanceled interest coupon notes, Gluecklich, elected to declare the principal sum due, and, on June 14, 1917, filed the present bill to foreclose the trust deed executed by Christopoulos. The defendants answered and on February 10, 1919, George Mangiaras filed an amended cross bill praying for the



surrender and cancellation of said \$500 principal note, and interest notes, and the release of the trust deed securing the same. After the cause had been put at issue the same was referred to a master in chancery to take proofs and report his conclusions of law and fact.

After hearing evidence the master reported, finding the facts substantially as above outlined. The master further found that, from a preponderance of the evidence, the said letter of January 30, 1917, addressed by the complainant, Gluecklich, to Christopoulos, was a sufficient notice to Christopoulos that complainant was the owner of said principal note of \$500 and said five interest coupon notes; that Kendall & Co. were not the agents of complainant; that complainant did not receive any part of the amount paid on March 14, 1917, to Kendall & Co. by Christopoulos, or any money on account of said principal note of \$500 or said coupon notes; that there is due complainant the sum of \$721.32, including solicitor's fees of \$100, besides costs and expenses; that said trust deed is a valid and subsisting lien against said premises; that the equities are with the complainant; and that the cross-complainant has failed to prove the material allegations of his cross-bill. The master recommended that a decree of foreclosure be entered in accordance with the prayer of complainant's bill, and that the cross-bill of George Hengiaras be dismissed.

Objections to the Master's report were overruled and the same were ordered to stand as exceptions before the court. After a hearing the Court overruled the exceptions, confirmed the Master's report and entered the decree appealed from.

The decision of this case, as we view it, depends upon the determination of a question of fact, viz: Was Christopoulos notified by Gluecklich that the latter was the holder of said \$500 principal note, and that all future payments thereon, including interest, should be made to him, prior to March 14, 1917,

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when Christopoulos paid the amount of said note to J. F. Kendall & Co? "The rule is, that the assignee, to protect himself from payments by the mortgagor to the mortgagee, must give notice to the mortgagor, actual or constructive, of the assignment to him." (Schultz v. Broelwitz, 181 Ill. 349, 352, and cases cited.) The evidence shows that Gluecklich, on January 20, 1917, from Joliet, Illinois, mailed such a notice to Christopoulos, addressed to him at No. 721 Blue Island Avenue, Chicago, which address was the one to which the original mortgagee had been directed to send letters to Christopoulos, and which said letters had been received by Christopoulos and acted upon by him. He, however, denied that he ever received such a notice. Proof that such a notice was put in an envelope, properly stamped and properly addressed and mailed, is presumptive evidence of its receipt. (Mayer v. Krohn, 114 Ill. 574, 586; Ashley Sira Co. v. Illinois Steel Co., 164 Ill. 149, 150.) Although the presumption thus created may be rebutted by evidence that the notice was not in fact received, nevertheless "the positive denial of its receipt by the person addressed does not necessarily nullify the presumption, but leaves the question for the determination of the court or jury trying the question, with such weight given to the presumption as it may be entitled to, but with the burden of proving receipt of the notice remaining upon the party who asserts it." (Haj. v. American Bottle Co., 182 Ill. App. 636, 642; see, also, 16 Cyc. 1070; Mayer v. Krohn, supra.) In the present case the master in chancery, who saw the witnesses and heard them testify, found from all the evidence, in effect, that Christopoulos did receive the notice and the court in its decree sustained that finding. While it is true that, where all the testimony in a chancery proceeding is taken before a master and the chancellor does not hear any of the witnesses, a reviewing court is not bound by the rule that the finding of the chancellor will not be disturbed unless it





is manifestly against the weight of the evidence (Oliver v. Ross, 209 Ill. 624); still it is the rule that "where the master has seen the witnesses and observed their manner and demeanor while testifying, the finding of facts made by him is entitled to due weight." (Kenner v. Matto, 239 Ill. 586, 593, and cases cited.)

Under the facts disclosed we are not disposed to interfere with the decree of the Superior Court of Cook County and it is accordingly affirmed.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.



134 - 25905

JUSTINE M. SHANKLAND,  
Appellant,

vs.

RALPH M. SHANKLAND,  
Appellee.

APPEAL FROM

COUNTY COURT,

COOK COUNTY,

221 I.A. 537

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case are undisputed. The plaintiff, Justine M. Shankland, who is the divorced wife of the defendant, Ralph M. Shankland, brought suit in assumpsit against the defendant alleging in her declaration the non-performance by the defendant of certain promises made by him in a written contract heretofore entered into between them. The sole defense relied on is that the contract is void as against the public policy of this State. At the conclusion of all the evidence the trial court, being of the opinion that the contract was void for that reason, directed the verdict in favor of the defendant, and from the judgment entered thereon this appeal is taken.

The contract sued on is set up in hæc verba in the declaration and is as follows:

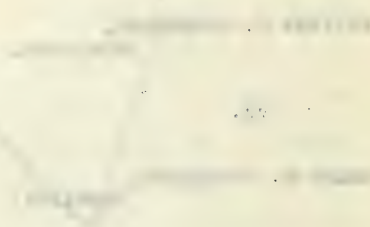
"Be It Known, that for ten years last past, and up to and until about May 1st, 1904, Ralph M. Shankland and Justine M. Shankland, husband and wife, lived together in the city of Chicago, Illinois, but since the date last mentioned have not lived together or cohabited, because of the disinclination and refusal of Mrs. Shankland so to do.

"That they have one child, a son, by name Ralph M. Shankland now of the age of about ten years.

"That, whereas, said Ralph M. Shankland has this day obtained a decree of divorce from the said Justine M. Shankland, in the Circuit Court of Cook County, Illinois, in case General No. 372772, by the terms of which decree of divorce, said Justine M. Shankland has been awarded the custody of said Ralph M. Shankland, the son of said parties.

"And, whereas, it is the desire of said Ralph M. Shankland that his son should be maintained in the style

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The following table shows the results of the experiment.

The results of the experiment are shown in the following table. The first column shows the time in minutes, the second column shows the value of the function, and the third column shows the derivative of the function. The data shows that the function has a minimum at approximately 10 minutes and a maximum at approximately 20 minutes. The derivative of the function is zero at these points.

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and manner to which he has been accustomed, and should be surrounded with the comforts of a properly equipped and well ordered home; that he should be surrounded and brought in contact with people of refinement, culture and good character; that his education should proceed along lines to fit him advantageously for a professional career with credit to himself and family, and realizing the considerable expense involved therein in order to carry out the proposition herein outlined, and to provide the means therefor, it is hereby mutually agreed between the said Ralph W. Shankland and Justine W. Shankland, that the said Justine W. Shankland shall and will, continuously, during the minority of the said son, establish, create, maintain and supervise a comfortable home for herself and her said son; that she takes it upon herself, carefully, to take care of the welfare and happiness of her son above named; to assist in every possible way in his development and education from a liberal standpoint; to provide him with such comforts, as far as practicable, as he has heretofore enjoyed; to assist in his education to the end that the said son may be fitted for a professional life, and to give him such advantages and opportunities as are possible with the means at her disposal; that she will guard him against improper associates; and, on the contrary, to surround his life with good influences only.

The said Ralph W. Shankland, in order to provide the means necessary to carry out the desires of the parties hereto, hereby agrees and binds himself to pay unto the said Justine W. Shankland the sum of \$125.00 per month, in installments of \$62.50 each, on the 1st and 15th of each month, so long as the said Justine W. Shankland shall have the care and custody of the said Ralph W. Shankland, and until his majority; provided, however, should the said Justine W. Shankland re-marry, then such payments shall cease, and this obligation be void.

The said Ralph W. Shankland further obligates himself to pay the necessary tuition fees for the education of his son, and also any extraordinary expenses that may be incurred on account of the illness of said child; the sum of money hereby referred to shall be used and expended in the discretion of the said Justine W. Shankland; in carrying out the spirit and purpose of this agreement she shall make no accounting of her disposals thereof, full confidence being had in her wise application of such funds for the purpose hereinabove indicated; and in the event that the said Ralph W. Shankland should die before his said son should reach the age of 21 years, the continued payment of said allowance is hereby made a charge against his estate, and payable by his executors and administrators.

The said Ralph W. Shankland further agrees that in consideration of the care, custody and control of the said Ralph W. Shankland by the said Justine W. Shankland, and upon her committing no act which would bring discredit upon herself, or her said child, or render her an improper person to have the custody and control of said child, said Ralph W. Shankland will pay unto the said Justine W. Shankland the further sum of \$100.00 per month so long as she may remain unmarried, and have the care and custody of said child; and should said child die before his majority, or arrive at the age of 21 years, while in the care and custody of his mother, then said Ralph W. Shankland binds himself to pay unto the said Justine W. Shankland thereafter in consideration of her care and education of said son,



the sum of \$125.00 per month, in installments of \$2.50 each, on the 1st and 15th day of each month, so long as she remains unmarried.

"Said Justine W. Shankland hereby agrees that said sums as herein provided for shall be, when so received, a full and complete release and discharge of the said Ralph W. Shankland of all claims and demands against him, for the care and expense incurred by her, in the support, education and maintenance of the said child.

"This agreement is executed in duplicate, and each duplicate copy is hereby made an original.

"It is further agreed that should said Justine W. Shankland re-marry while she has the custody of said child, and before his majority, then said Ralph W. Shankland agrees and binds himself to pay all the necessary expenses that may be incurred in the keeping, maintenance and education of his son."

The circumstances under which the foregoing contract was entered into were as follows: June 22, 1900, the defendant, Ralph W. Shankland, as complainant, filed his bill for divorce against the plaintiff, Justine W. Shankland. On the 30th day of that month (eight days after the filing of the bill) a decree was entered finding that the defendant on the first day of May, 1904, wilfully deserted complainant, and it was adjudged that the marriage between them should be dissolved. The decree also provided that the custody and control of the son, Ralph W. Shankland, who was then a lad between ten and eleven years of age, should be given to the mother "until the further order of court, and that the complainant have the right to visit and have the companionship of said child at any proper time and as frequently as he may desire."

The hearing on the bill was had in court on June 29th. While the contract purports to have been entered on the day the divorce was obtained, it was, in fact, made prior to that time.

The husband and wife had been living apart for more than two years and there is nothing in the record to indicate other than that the divorce was entirely justified upon the grounds upon which it was granted. The contract is not mentioned in the decree. It was not at any time submitted to the court. It was executed in





duplicate. Mrs. Shankland was represented in the negotiations by an attorney, Mr. Shuey. She signed the contract in his office. Mr. Shankland was also represented by an attorney, Mr. Oppenheim. These attorneys consulted about the contract and agreed upon its terms.

The parties with their attorneys met in conference on June 20th or 21st just prior to the filing of the bill. The attorney for Mr. Shankland testified "That contract was prepared during this conference by Mr. Shuey. He was the one who did most of it; have no independent recollection as to whether the contract was signed at that time. My impression is that it was signed previous to the entry of the decree in the divorce suit, think Mr. Shuey signed it probably before I filed the bill, and that I held it for a few days until the decree was granted or until Mr. Shuey desired it to be delivered to him. I think I held the escrow, as he called it, for a few days, how many days, I could not say."

The sole question to be decided is whether this contract thus executed and delivered is void as against the public policy of this State. Whatever the policy of other states may be it is settled in Illinois that the courts will carefully scrutinize such contracts, and that if the effect of the contract is to stimulate divorce it is void. In Silberschmidt v. Silberschmidt, 118 Ill. App., 69, this court said:

"It appeared by the testimony of appellee's solicitor in the divorce suit, called as a witness by appellant, that the agreement was made pending the suit and prior to the decree. A learned author, commenting on such agreements says 'But if the contract is of a sort to stimulate the divorce, to discourage any defense, or in any way to impose upon the court, it will be void. For example it will be void if so framed as to have effect only on condition that a divorce is granted without alimony. Hence practically, and almost and sometime quite as a matter of law, an agreement of this sort should be laid before the judge, when to





an extent not readily definable, it will be ill if he dissents and good if he approves.' 2 Bishop on Marriage, Divorce and Separation, sec. 705. The courts do not favor but rather incline against such agreements as tending to collusion between the parties, and also tending to facilitate divorces."

Hamilton v. Hamilton, 89 Ill. 349; Martin v. Martin, 65 Ia. 255; Woom v. Baum, 58 Ind. 194; Baggett v. Baggett, 6 Paige 509. And in Stuckey v. Stuckey, 129 Ill. App. 955, it was said:

"Although after a decree of divorce has been granted, upon a bill therefor filed in good faith and without collusion, an agreement between the parties as to the amount and terms of alimony will be recognized and enforced by courts, (Storey v. Storey, 125 Ill. 606) it is otherwise when such agreement is made prior to and independent of the sanction of a decree for divorce, but based upon a decree thereafter to be obtained."

In the case of Hamilton v. Hamilton, 89 Ill. 349, where the wife had instituted a suit against her husband for divorce and for alimony, the Supreme Court said with reference to a contract made pending such suit:

"The majority of the court, however, are of the opinion that the contract set out in the declaration is, in its essence and character, against public policy, and that it must be held invalid upon that ground. While divorces are authorized by law, they ought not to be encouraged. In this contract there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce, still, it is thought that to permit such a contract as this, to be enforced in the courts, would open a door for the attainment of divorces by collusion, and upon this ground the decision of the court in sustaining the demurrer to the declaration ought to be sustained."

Was the natural tendency of this contract here sued on to stimulate the divorce between the parties? Looking at its terms and considering all the circumstances under which it was made and delivered, we are forced to the conclusion that such was the inevitable effect of it. Had the agreement been submitted to the court and approved by the decree a different question would have arisen. Thayer v. Thayer, 190 Ill. App. 8.

the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

The Commission is aware of the fact that the CLPE has been active in the United States since 1945.

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It is perfectly apparent that the decree in this case could not have been obtained in eight days after the filing of the bill (as it was) without some assistance to the complainant from the defendant. That Illinois is not the only state enforcing this rule with vigilance is apparent from an examination of the authorities. Adams v. Adams, 25 Minn. 72; Martin v. Martin, 65 Ia. 255.

Counsel for appellant in discussing Hamilton v. Hamilton, supra, quote from a dissenting opinion by Justice Dickey, and say:

"This it seems to us is a more reasonable ground upon which to base a conclusion."

We are, however, bound by the majority opinion.

The judgment will be affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

[illegible]

... ..



PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

JOSEPH MOYR,  
Plaintiff in Error.

COURT TO MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was arraigned on an information which charged that he "on the 14th day of March, 1900, at the City of Chicago, Cook County, Illinois, fourteen dollars (\$14.00) in lawful money of the United States of America, the exact denomination of which is unknown to this affiant, of the value of fourteen dollars, the personal goods and property of George L. Lee, did then and there wrongfully and unlawfully take, steal and carry away, contrary to the Statute, etc." He waived a jury, entered a plea that he was "guilty in manner and form as charged in said information." The record further recites that "said defendant being duly advised by the court as to the effect and consequences of said plea, and said defendant still persisting therein, the court orders said plea to be accepted and entered of record against said defendant." The plaintiff in error was sentenced to pay a fine and serve one year in the House of Correction. No bill of exceptions was preserved.

It is first argued by plaintiff in error that the record fails to show that the consequences of entering the plea were fully explained to him, and that error further appears from the record in that the court failed to hear evidence upon the plea. Plaintiff in error relies on section 4121, chapter 38, 2 Jones & Addington's, page 2217. That statute has been construed in Judge

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v. Levinston, 267 Ill. 45, and the construction there adopted is, we think, conclusive against these contentions.

It is next urged that the information is defective in that it fails to show the proper denominations of the money alleged to have been stolen, and that the record fails to show that any evidence was heard to sustain the averment that the exact denominations of the money were unknown. On this last point plaintiff in error relies on People v. Hunt, 251 Ill. 446.

We think the information was not defective, and we do not think that the case cited is applicable here. In that case, unlike this one, a bill of exceptions was preserved.

It is next insisted that the finding of the court as to the value of the property alleged to have been stolen is insufficient. People v. Rubin, No. 25269 Appellate Court, is cited on this point, but the finding there held insufficient is materially different from the finding here, which we think is sufficient to sustain the judgment, and it will therefore be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.



230 - 20403

PETER C. McARDLE,

Appellee.

v.

GIVE OF CHILMARC, et al. etc.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 638

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 24, 1920, when this cause was here before, an opinion was rendered reversing the judgment of the Circuit Court, and concluding as follows: "That this cause be remanded to the Circuit Court of Cook County with directions that a peremptory writ of mandamus be issued to restore the petitioner to the office or position from which he has been illegally removed, and for the further relief as to his salary as prayed for." (216 Ill.App.343.)

In the court below, at the first hearing of the cause, the trial court had found the issues in favor of the defendant and dismissed the petition. Upon a writ of error by the petitioner, that judgment was reversed and the cause remanded with directions, as above stated, that a peremptory writ of mandamus be issued to restore the petitioner to the office or position from which he had been removed and for other relief as to his salary. Pursuant thereto, the petitioner then filed in the trial court, a mandate of the final judgment of this court, and entered a motion for judgment in accordance with the mandate. Concurrently with that motion,



# CHURCH

THE CHURCH OF THE HOLY TRINITY, NEW YORK

1880

THE CHURCH OF THE HOLY TRINITY, NEW YORK, was organized in 1846, and has since that time been a place of worship and instruction for the poor and the ignorant. It has been a place of refuge for the oppressed and the persecuted, and a place of comfort for the afflicted and the sorrowing. It has been a place of instruction for the young and the old, and a place of refuge for the stranger and the foreigner. It has been a place of instruction for the poor and the ignorant, and a place of refuge for the oppressed and the persecuted. It has been a place of comfort for the afflicted and the sorrowing, and a place of instruction for the young and the old. It has been a place of refuge for the stranger and the foreigner, and a place of instruction for the poor and the ignorant.

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the petitioner moved that the peremptory writ be directed to the city clerk and aldermen.

On July 10, 1920, the trial court entered judgment. By that judgment the commissioner of public works and the comptroller and the city treasurer were made respondents to the petition. By that judgment, also, the trial court granted a peremptory writ of mandamus to issue forthwith commanding certain officers of the City of Chicago to pay certain moneys to the petitioner and also to re-instate him in the office of cement tester and to restore to him his salary of \$230.00 per month, and further, that the City of Chicago, its city clerk, Mayor and City Council - all of whose names are therein set forth - do appropriate in the appropriation ordinance to be enacted next following the service of said peremptory writ of mandamus, (first), the sum of \$32,975.00 for the payment of the petitioner for salary as cement tester from January 1, 1919, to April 30, 1920; (second), the further sum of \$2,000.00 for the salary of said office of cement tester for the rest of the fiscal year of 1920; (third), command and enjoin that no said appropriation being made the said respondent, City of Chicago, the Mayor, Comptroller, Treasurer and Commissioner of Public Works, each being named, forthwith, pay and cause to be paid the above amounts to the petitioner, Peter J. McFarlane.

The judgment of the trial court also provided for further appropriations for his salary and its payment to him; and that the petitioner should have leave to apply to the court in the future as occasion might arise or require in order that the relief prayed for might be completely obtained.

Counsel for the respondents contend (1) that the



Circuit Court was without jurisdiction to enter the judgment; (2) that it was error to award the writ against the city council of the City of Chicago and the civil service commission of the City of Chicago, whether neither of which bodies were parties to the original petition; (3) that it was error to direct the city council to appropriate the salary of the petitioner; (4) that the order of the court goes beyond the scope of the prayer of the petition in that it virtually gives to the petitioner a life position as cement tester regardless of his future conduct; and (5) that it was error to provide that the petitioner might apply at any time in the future for a new writ against any future officer of the City of Chicago to enforce his rights.

(1) As to the question of jurisdiction. Inasmuch as the judgment of the trial court was reversed and the cause remanded with directions that a peremptory writ of mandamus be issued, etc. and the cause was subsequently reocketed pursuant to the mandate of this court, it follows that the Circuit Court had authority and jurisdiction to do all that was necessary to the issuance of the writ which, of course, would include a judgment order awarding the writ. No special form of words are necessary in the judgments of this court in reversing and remanding with directions.

(2) Was it error toward the writ against the City Council of the City of Chicago and the Civil Service Commission of the City of Chicago, neither of which bodies were parties to the original petition? Of course, originally it was only necessary that the City of Chicago should be the respondent, but subsequently when it then came to order and issue the writ





inasmuch as it would become necessary that it should be served upon some one or more of the agents of the City who would be compelled to act in discharge of their duties, it was proper that the members of the City Council and of the Civil Service Commission should both be parties and be served.

In The People ex rel v. Seizendaner, et al. 137 Ill. 234, which was a mandamus case, the court said, "It would, therefore, in the present case, doubtless, have been sufficient to have filed the petition against the town, without naming individuals, to have obtained a peremptory mandamus to each of the agencies and instrumentalities through which it must act to make payment of the claim due the relator; but it was competent to make the individuals whose duty it is to act, parties, as was here done. (Village of Glencoe v. The People, 78 Ill. 386; Sheaff v. The People, 37 id. 189.) But it is, obviously, in either event, the action of a corporate body, and not the action of natural persons, as such, merely, that is to be enforced."

(5) Did the trial court err in directing the City Council to appropriate for the salary of the petitioner? In the opinion handed down in this cause by this court the following language was used; "No obstacle exists to the granting of complete relief in one proceeding. The right of defendant in error to his salary is as clear as his title to the office." Inasmuch as the court found that the petitioner was the only person certified and appointed to the office of cement tester and that he was never legally taken from that office, it follows that the contention of the respondent that a de facto officer has been receiving the salary for the office is un-



tenable.

(4) Does the order of the trial judge extend beyond the scope and prayer of the petition and virtually give to the petitioner a life position as cement tester regardless of his future conduct? It will be observed that the language of the order of the trial judge provides for an annual appropriation for the salary of the office and then directs the payment of that salary only while the petitioner performs the work and remains an incumbent of the office of cement tester. That is in accordance with the law.

(5) Did the court err in providing in the order that the petitioner might apply at any time in the future for a new writ against any future officer for the City of Chicago to enforce his rights? Inasmuch as the relief prayed for is complex and for its fulfillment requires action on the part of the various agents of the municipality, it is not unreasonable that the court by its order should provide for a retention of jurisdiction pending the consummation of all the purposes of the litigation.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, J.J. CONCUR.



FANNIE ORNSTEIN,  
Appellee.

vs.

S. S. MORRISON,  
Appellant.

APPEAL FROM COUNTY COURT  
OF COOK COUNTY.

221 I.A. 638

MR. PRESIDING JUSTICE MCLORD  
DELIVERED THE OPINION OF THE COURT.

In an action for personal services plaintiff had judgment for \$355 on the verdict of a jury, and defendant brings the record to this court for review.

It appears that plaintiff worked in the family of defendant as a nurse, at the same time doing some of the general household work; that she worked for thirteen weeks during the fall of the year 1918, and that during such time defendant's wife suffered from the influenza at that time deadly prevalent in Chicago and elsewhere in this country, and that plaintiff nursed defendant's wife while she was so suffering, as well as two of his children.

The dispute between the parties relates to the compensation to be paid plaintiff for such services. Defendant insists that the agreement was to pay a reasonable price for plaintiff's services, while plaintiff insists that she was to be paid five dollars a day therefor. Defendant paid plaintiff one hundred dollars, insisting that that sum was a reasonable price for the services rendered. The jury returned a verdict awarding plaintiff compensation at the rate of five dollars a day.

We think the verdict is easily reconcilable with the contention that five dollars a day is but a reasonable price for





the services rendered by plaintiff as a nurse during the time of the influenza epidemic. Nurses were not only in great demand at that time, but difficult to procure, and the jury may have believed, as we do, that five dollars a day was but a reasonable price for plaintiff's services at the time and under the circumstances they were rendered.

Upon this theory we find no rulings on the evidence or in the instructions which adversely affected the rights of the defendant. The questions before the jury were of fact, and we think they reached by their verdict a righteous conclusion.

There is no error in the record calling for a reversal of the judgment of the municipal court, and it is therefore affirmed.

AFFIRMED.

Dever and McSweeney, JJ., concur.



244 - 26417

STANLEY KULA and FRANK  
KUBASIAN,

Appellees,

vs.

JAN ZAWIERUCHA and ANILA  
ZAWIERUCHA,

Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 638

MR. PRESIDING JUSTICE HOLDON

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court denying the motion of defendants to open up the judgment rendered by confession and to permit them to make a defense.

The affidavit, if true, demonstrates that the note on which the judgment was confessed was procured by fraudulent means and that no consideration passed from plaintiffs to defendants therefor.

From this affidavit it appears that the defendants on November 29, 1919, owned real estate known as 1423 Cornell avenue, Chicago; that on or about that date defendants wished to sell the real estate and were visited by the plaintiffs, who told Jan Zawierucha that they would sell defendants' real estate for cash and that they would give all cash for the property, although no particular sum was mentioned at the time; however, plaintiffs were told to go ahead and sell the real estate for cash; that at this time defendants, who are natives of Poland, and do not understand the English language or American customs, signed the notes upon which judgment was entered; that neither the contract which was given to plaintiffs at that time authorizing them to sell defendants' real estate, nor the notes, were read over to them or



1912

### Standard Oil Company

The Standard Oil Company, which was founded in 1870, was one of the largest and most powerful corporations in the United States. It was controlled by John D. Rockefeller and his family. The company was involved in the oil industry, including refining, distribution, and transportation. It was also involved in other industries, such as railroads and utilities.

Rockefeller's control over the Standard Oil Company was so complete that it was often referred to as a monopoly. The company's success was due to its efficient operations and its ability to control the market. Rockefeller's control over the company was also due to his personal involvement in the business.

Rockefeller's control over the Standard Oil Company was so complete that it was often referred to as a monopoly. The company's success was due to its efficient operations and its ability to control the market. Rockefeller's control over the company was also due to his personal involvement in the business. The Standard Oil Company was one of the most powerful corporations in the United States, and its success was a result of Rockefeller's control over the company. The company's success was also due to its efficient operations and its ability to control the market. Rockefeller's control over the company was so complete that it was often referred to as a monopoly. The company's success was due to its efficient operations and its ability to control the market. Rockefeller's control over the company was also due to his personal involvement in the business.



either of them; that plaintiffs did not do so, saying it was unnecessary because they were taking care of the whole matter and of all defendants' interests, and that they need not worry about the terms of the papers; that the papers they were signing were part of the papers needed to sell the real estate for cash; that in signing said papers they relied upon such statements of plaintiffs; that plaintiffs, instead of selling the real estate for cash, as they promised, offered to defendants other property in trade, which they declined to accept as not being within the terms of the agreement, stating they did not want to trade their property for other property, but did want to sell it for cash. Thereupon the judgment in controversy was entered.

It is clear, if the facts set forth in said affidavit are true, that a gross fraud was perpetrated upon defendants, that they were deceived in the transaction, and that they were not justly indebted upon the judgment notes or the contract to plaintiffs.

A motion of this character is addressed to the sound judicial discretion of the trial judge, and if the affidavit filed in support of such motion shows upon its face that the judgment is unjust or against equity and good conscience, it is the duty of the court to grant the motion and let the defendants in to plead and defend, allowing the judgment to stand as security until the case can be tried.

It is contended that defendants failed to act with that promptness in making their motion which the law requires in such cases. The ignorance of defendants of the language and customs of this country is, we think, sufficient to excuse their tardiness.

The denial of the motion to open up the judgment was an abuse of the court's discretion.

The order denying the motion appealed from is re-



versed and the cause is remanded with directions to allow the motion of defendants to open the judgment and to be let in to defend to the merits, with the limitation that the judgment stand as security until the cause can be heard on issues joined.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever and McSurely, JJ., concur.



263 - 26437

GEORGE BUSCH,

Appellee,

vs.

YELLOW CAB COMPANY,

Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

221 I.A. 638

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

In a jury trial there was a verdict and judgment for \$3000 thereon in an action for personal injuries, and defendant appeals.

There are no procedural errors calling for a reversal. The instruction challenged is without infirmity. It was directed to the elements of damage plaintiff was entitled to recover, and was predicated upon the jury finding a verdict of guilty. It did not contain the elements necessary to be proven to entitle plaintiff to recover; it was not given for that purpose. It was confined to injuries suffered by plaintiff as a result of the accident for which he was entitled to recompense. It did not direct a verdict. Other instructions were given which sufficiently directed the jury's attention to the necessity of proof that the plaintiff must have been in the exercise of due care for his own safety at the time of the injuries, and to every other element essential to warrant a recovery.

The judgment must, however, be reversed for the improper and intemperate remarks of plaintiff's counsel to the jury in his closing argument, <sup>among</sup> the most glaringly injurious of which was the remark that "the shock of the injury and the shock of an operation does not get over until after twenty-four hours at least, and they ask him to remember all these things. Somebody





207 / 199

1912 1913

The following table shows the results of the survey conducted in 1912 and 1913. The results are given in the following table.

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sought to be satisfied. None of these people died, and they were not indicted for murder."

The only office of such remarks must have been to inflame the minds of the jurors against the defendant, and it may be that the result of the verdict resulted from prejudice thus engendered. While it is true that an objection to these remarks was sustained by the trial Judge, still the indiscretion in making them was not atoned for thereby nor their prejudicial effect nullified.

Other remarks were made calculated to improperly influence the minds of the jurors, objections to which the court erroneously overruled. Among other statements was the following:

"It is not the result of a mere accident or anything of that kind. It is one of the rottenest cases of recklessness that has ever been presented to a jury in Cook county, and it is by your verdict in these cases that we are going to put a check to the operation of automobiles upon the public streets of this city and to the operation of the street cars in connection therewith when they see machines approaching as to deter them and let them know that they cannot get away with it, no matter how able the counsel are they present on their behalf."

Another observation of counsel was that, "when people get to that condition of mind, operating street cars and operating their automobiles, when they have passengers to say, 'We are on the street and the public be damned,' then it is time for the jury to step in and say, 'We will call a halt on it or we will take your money if you hurt these people.'" An objection to these remarks was overruled by the trial Judge. Similar remarks have frequently been condemned by this and the Supreme Court as constituting reversible error. Chicago Ry. Co. v. Rath, 114 Ill. App. 351; Bishop v. C. & N. R. Co., 289 Ill. 69.

For the foregoing reasons the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

Dever and McGuire, JJ., concur.



CHICAGO HERALD COMPANY,  
a corporation,

Appellee.

vs.

MARTIN LARSON,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 638

MR. PRESIDING JUSTICE HOLDEN

DELIVERED THE OPINION OF THE COURT.

This is a case of the first class in the Municipal court brought upon five contracts for advertising with the plaintiff company, extending over a period of about five years.

The account involved many items for advertising during the period of the contracts, amounting to \$17,860.26. Payments made added to the amount of the judgment, \$1459.10, balance the account.

The trial was before the court without a jury and there was a finding for the full amount of the claim and a judgment thereon, from which defendant prosecutes this appeal.

In defendant's affidavit of merits he makes this statement:

"Said defendant reserves to himself all benefit of advantage and exceptions, which may be had or taken of and to the many insufficiencies of plaintiff's amended statement of claim, or any insufficiency of proof offered in said cause under said amended statement of claim, and any variance between any proof offered in said cause and said amended statement of claim, or any question of competency of evidence which may be offered, or any other matter of defense which may arise upon the trial of said suit."

These words are meaningless in a common law action and constitute no defense to plaintiff's claim. Most of the words used are found in replications to answers in equity pleading. They follow a denial of some specific items and the claim of insertions of different advertising matter than that requested by defendant. He





likewise sets up as a defense the discontinuance by plaintiff of the publication of its newspaper April 20, 1918, which he claimed rendered plaintiff powerless to perform its contracts; also that there was an accord and satisfaction between the parties after plaintiff ceased publication of the Chicago Herald.

In plaintiff's statement of account it set forth every item of its claim, and the court held - correctly, we think - that all the items of such account not specifically denied by defendant in his affidavit or exhibits stood admitted; so that in the first instance plaintiff was only required to make proof of the items disputed in the affidavit of defense; and the court further held that as to such items a prima facie case was made out.

Plaintiff made proof of all the items disputed in defendant's affidavit of defense.

In January, 1918, defendant gave plaintiff a check for \$716.45, which paid for all of the items in the April, 1917, account. Defendant offered in evidence a full page facsimile of the advertisement of April 8, 1917, across the face of which was written, "Compliments of the Chicago Herald," and insisted that the advertisement was complimentary and that there should have been no charge made therefor. There was no proof as to who made the writing across the face of the advertisement, or that there was any agreement that the advertisement was to be without charge. There is nothing in the contracts by which plaintiff agreed to publish any advertisements of defendant without charge. As to fourteen items claimed to have been published without authority in the month of January, 1918, seven items were proven by plaintiff to have borne the "C. H." of defendant; it also proved that the remaining items were published in the Chicago Herald on the several dates called for.

Other items defendant claimed were published without his approval, but that they were published is admitted.



Plaintiff contends that it was not necessary that such advertisements should have the approval of defendant before publication, and refers to the following provision in the contract:

"Herald will not be liable for any error in advertising published hereunder, unless proof of such statement is requested in writing by the advertiser and returned to Herald office with such error or correction plainly noted in writing thereon in ample time for correction before Herald edition goes to press."

It was proven that defendant received proofs for the advertisements and it does not appear from the evidence of defendant that he proffered any corrections on the proofs submitted or ordered any change in copy. Other items complained about were proven to have received the "O. K." of defendant.

Defendant contends that there was an accord and satisfaction when he delivered his check to plaintiff for \$1188.50, July 29, 1918, on the face of which was written, "paid in full to date." Defendant contends that the check was given on a settlement made between the parties when objections were made by defendant to plaintiff's charges, and that he wrote the words, "paid in full to date" before delivering the check. It was denied by the testimony of several witnesses for plaintiff that the words "paid in full to date" were on the check at the time it was delivered to plaintiff, or at the time it was deposited by plaintiff in its bank account, and the claim of an agreement for an accord and satisfaction was likewise denied.

Plaintiff, to discredit defendant's contention and to show that the account between the parties was still open, introduced a letter of defendant dated August 19, 1918, - a date subsequent to the date of the alleged agreement of accord and satisfaction - in which complaints were made about the account, showing conclusively that defendant understood, at least at that time, that the account was unsettled.



There is no evidence in the record justifying the conclusion that plaintiff went out of business or ceased publishing its newspaper, thereby putting it out of its power to perform its contract with defendant, and no evidence that defendant requested plaintiff to perform any part of its contract which it failed to do.

The trial Judge saw the witnesses, observed their manner upon the witness stand, and therefrom was much better qualified than are we to determine the credit to be given to the testimony of the several witnesses; and as we are not able to say from the evidence found in the record that it does not support the judgment, or that the judgment is manifestly against the weight of the evidence, we are not permitted to reverse it. In the absence of the rules of the Municipal court, this court will presume that the trial Judge acted in accord therewith in the hearing of the evidence and the entry of the judgment. Russell v. Cochran, 204 Ill. App. 418.

There being no reversible error in the record, the judgment of the Municipal court is affirmed.

**AFFIRMED.**

Dever and McDurely, JJ., concur.





L. C. DIBBDALE,  
Appellee,

vs.

BENJAMIN J. BOWEN,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 639

MR. PRESIDING JUSTICE HOLBOM  
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant on his promissory note for \$500, payable to plaintiff's order, and also sued out an attachment in aid, alleging that defendant was about to fraudulently conceal, assign, or otherwise dispose of his property or effects so as to hinder and delay his creditors, and attached defendant's automobile thereunder.

A trial before the court without a jury resulted in a finding sustaining the attachment and a judgment upon the writs for \$504.36, from which defendant prosecutes this appeal.

Plaintiff has filed cross errors on the ruling of the court sustaining the objection to the questions asked plaintiff, "Do you know whether Mr. Bowen has ever been arrested?" and "what were your previous dealings with Mr. Bowen?" Plaintiff's counsel stated that he intended by proof to justify the first question on the ground that defendant had a general "unsavory" reputation, and that he had a reasonable apprehension that defendant would carry out his threat to fraudulently dispose of his property, etc.

We think the objections to these questions were properly sustained, as the answers, if permitted to be given, would shed no light upon the grounds assigned for the issue of an attachment in aid or as to the merits of plaintiff's claim on the note, which was not disputed.



Graph showing the trend of the data over the period 1940 - 1941.

The data shows a significant decrease in the value of the variable over the period 1940 - 1941. This is likely due to the economic conditions of the time, which were characterized by high unemployment and low production. The graph illustrates the volatility of the data, with several sharp declines followed by temporary recoveries. The overall trend is clearly downward, indicating a period of economic hardship.

The data also shows a period of relative stability in the early part of the period, followed by a sharp decline. This suggests that the economy was initially in a state of equilibrium, but then experienced a sudden shock that led to a rapid deterioration in the value of the variable. The graph highlights the importance of monitoring economic indicators during such periods of uncertainty.

The data further shows a period of recovery in the latter part of the period, followed by a final decline. This indicates that the economy was able to partially recover from the initial shock, but then experienced a second decline. The graph underscores the complexity of economic recovery and the need for continued monitoring and intervention. The overall trend remains downward, despite the temporary recovery.

The data concludes with a final decline in the value of the variable, suggesting that the economic conditions remained challenging. The graph provides a clear visual representation of the economic trends of the period 1940 - 1941, highlighting the volatility and overall downward trend.

Two witnesses testified in the case - plaintiff and defendant. Plaintiff testified that he had several conversations with defendant after the note became due, in which he told him he could not pay the first day, but to come the following day; that plaintiff waited upon defendant on several following days, when defendant told plaintiff he was going to sell his business and his machine and "beat it" out of town; that he was heavily in debt and that he could not do business in Chicago.

Defendant denied making the statements that he was going to sell his business and his machine and "beat it" out of town, but admitted that he contemplated selling his business so that he could "make good on it." On cross examination defendant testified that three persons were present when the conversations were had between plaintiff and himself.

The elementary principle of law that the plaintiff must maintain his case by a preponderance of the evidence is not complied with when an affirmative statement by the plaintiff is positively denied by the defendant. As there were three other witnesses to these conversations besides the parties, plaintiff was not without support to his evidence, if what he testified to was true.

Fraud is never inferred; it must be proven. Defendant's statement regarding his intention to sell his property was not for the purpose of defrauding plaintiff or any of his creditors, but with the intention of paying his debts. This evidence of defendant has not been overcome by that quantum of proof which the law requires. An attachment in aid is purely statutory, a drastic remedy in the enforcement of which no presumptions will be indulged. It was obligatory upon plaintiff to prove by a preponderance of the evidence some one of the material averments in





his affidavit, in faith of the verity of which the attachment writ was issued. This he failed to do.

For the foregoing reasons the judgment of the Municipal Court is reversed and the cause is remanded to that court with directions to dissolve the attachment.

REVERSED AND REMANDED.

Dever and McGuirely, JJ., concur.



352 - 26526

JAMES TURNER,  
Appellee.

vs.

ROBERT CATHERWOOD,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 639

MR. PRESIDING JUSTICE HOLBOM

BELIVERED THE OPINION OF THE COURT.

In an action for the recovery of money due from defendant to plaintiff for plumbing work and material furnished, there was issued an original, an alias and five pluries summons, all of which were returned not found by the Municipal court bailiff. Thereupon plaintiff procured the issuance of an attachment in aid of his suit against the property of defendant and the First National Bank of Chicago was summoned as garnishee.

Plaintiff averred in his affidavit for an attachment in aid that defendant was a resident of Chicago; that he concealed himself and stood in defiance of an officer so that process could not be served upon him. Defendant appeared specially, traversed the averments of the affidavit for attachment, and on a hearing the issues on the attachment were found against defendant and in favor of plaintiff. Defendant proved an appeal from the order entered on this finding, which was denied.

June 28, 1920, an order and judgment were entered, the material finding portion of said order being that on motion of plaintiff defendant was ruled to appear instantor, and on being called came not, but therein made default; and the court finding that defendant was duly notified by publication of notice, according to law, of the pendency of the suit and of the time he was required to appear, ruled that for his non-

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The diagram illustrates the V-shaped structure of a mountain range. The left side of the V is labeled 'Left side' and the right side is labeled 'Right side'. The top of the V is labeled 'Top' and the bottom is labeled 'Bottom'. The diagram is a schematic representation of a V-shaped structure, possibly a cross-section of a mountain or a geological feature.

The text below the diagram discusses the geological formation of the V-shaped structure. It explains that the V-shape is formed by the erosion of the mountain range. The erosion is caused by the wind and the rain. The wind erodes the top of the mountain, and the rain erodes the sides. The erosion is a continuous process, and the V-shape becomes more pronounced over time.

The text also discusses the importance of the V-shaped structure in the study of geology. It explains that the V-shape is a key feature of a mountain range, and it can be used to determine the age of the mountain. The V-shape is also a key feature of a mountain range, and it can be used to determine the age of the mountain.

appearance he suffer judgment by default. Judgment was thereupon entered against defendant by default for the sum of \$135 and on execution thereon awarded after the hearing of proofs, oral and documentary. Subsequently and on July 2, 1930, judgment for \$135.10 was entered against the parishess on its answer. From the order entering judgment against defendant for \$135 this appeal was prayed, perfected, and prosecuted.

There is ample evidence sustaining the averments of the attachment affidavit that defendant was a resident of Chicago and concealed himself and stood in defiance of an officer. A bailiff who attempted to serve the writ testified that he saw defendant at a window of his house when his presence there was denied by the person who came to the door, and that on another occasion in a talk between defendant and another bailiff over the telephone, in answer to the bailiff's statement, "We are having an awful job to get service on you," defendant answered, "Serves me if you can."

Defendant did not appear generally in the action, his appearance being special and limited to traversing the grounds for the attachment averred in the affidavit for such writ. The taking of an in personam judgment against him was erroneous, as the court had not acquired jurisdiction of the person of the defendant in the action.

By sec. 311, chap. 37, Municipal Court Act, it is provided that in cases of attachment, etc., the practice and proceedings in the municipal court shall be the same, or as near as may be, to that which is now prescribed by law for similar cases in other courts of record.

In the Attachment Act, chap. 11, R. S., sec. 35, it is in effect provided that where a defendant is not served with process, the judgment shall be in rem against the property





attached and that a special execution shall issue against such property and that no execution shall issue against any other property of the defendant, nor shall such judgment be any evidence in any subsequent suit of debt against such defendant.

The judgment in the instant case is in personam with an award of an execution; and it was held in Olymora v. Williams, 77 Ill. 618, that in an action aided by an attachment, where there is no personal service upon the defendant and no appearance, it is erroneous to award a general execution against the property of the defendant, and that to give jurisdiction to the court in an attachment suit where there is no personal service or appearance, it must appear that the writ was either levied upon property of the defendant or served upon garnishees having effects, choses in action or credits in their possession or power belonging to the defendant.

The service of the garnishee process upon the First National Bank and the discovery of funds of defendant in its hands, gave the court, in the absence of an appearance, jurisdiction to proceed to adjudicate the rights of the parties to the funds attached, but did not confer jurisdiction to enter a judgment and award a general execution against defendant.

Haywood v. Collins, 60 *ibid* 328.

For the error of the trial court in entering a judgment against defendant for the amount of the debt and awarding execution thereon, the judgment of the Municipal court is reversed and the cause is remanded with directions to that court to strike therefrom that part of the judgment awarding an execution thereon against defendant and limiting the operation of the judgment to the property in the hands of the garnishee as shown by the judgment against it on its answer as garnishee.

REVERSED AND REMANDED WITH DIRECTIONS.  
Dever and McSurely, JJ., concur.



97 - 26263

BENOLD STERN, Administrator  
of the estate of HARRIS STERN,  
deceased.

Appellee.

vs.

ARTESIAN LIME STONE COMPANY,  
a corporation.

Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 639

MR. JUSTICE DYER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court entered against it and in favor of plaintiff for the sum of \$800. The action is based upon a contract for the sale and delivery of certain scrap iron and steel.

The contract in question was dated April 13, 1917, and is in part as follows:

"The 'Company' agrees to sell to said 'Buyer' any and all scrap iron or steel, such as they may be in a position to load on cars within the next thirty (30) days at their plant at 2500 Grand avenue, Chicago, Illinois, for the sum of sixteen and fifty hundredths (\$16.50) per net ton of 2000 pounds, railroad weights to govern, cars to be weighed loaded and empty.

The terms of sale are to be sight draft with bill of lading attached. Cars are to be consigned to the order of the Artesian Limestone Company, care H. Stern, 22nd street and Ashland avenue, Chicago, Illinois, routing C. M. & St. P. and C. B. & Q. Railroad Companies.

Scrap is to be loaded by the 'Company.' The 'Company', however, is not to be held responsible in any manner whatsoever in the event of their inability to obtain railroad equipment, fires, accidents, strikes, labor trouble or other causes beyond their control."

For the plaintiff it was alleged that although the time for delivery of the scrap iron and steel had long since elapsed, and that plaintiff had been ready and willing to receive the material, the defendant had refused to deliver it, and that as a consequence plaintiff had been deprived of certain gains and profits; that defendant had on hand 150 tons of scrap





iron and steel which it was in a position to deliver to plaintiff within 30 days after the making of the contract; that its failure to so deliver the material constituted a breach of the contract and that at the time of such failure the difference between the contract price and the market price of scrap iron and steel was \$14 per ton net.

In an affidavit of merits the defendant denied material averments of the statement of claim and specifically denied that it had on hand 150 tons of scrap iron and steel as alleged in the statement of claim or that it was in a position to deliver the same on cars within 30 days as provided in the contract; that the difference between the market price and the contract price of the material was not as alleged in the statement of claim. In an amendment to the affidavit of merits defendant averred that the contract was too vague and indefinite to impose an obligation on defendant to deliver the material to plaintiff and also that defendant was prevented from delivering the scrap iron and steel by inability to obtain railroad equipment and by labor trouble and other causes beyond its control. It is admitted that the plaintiff requested delivery of the material and that none was furnished him. Such argument is had in the brief of counsel touching questions of fact in issue on the trial, one of which was as to whether the defendant was in fact "in a position to load on cars the material contracted for." There was a direct conflict in the evidence as to whether the defendant was in fact in a position to deliver the material and as to whether the defendant was able to procure cars or labor sufficient to enable it to deliver the scrap iron and steel within the thirty days required by the contract. We do not deem it advisable to discuss these questions as in view of what is hereinafter stated the judgment of the trial court must be reversed.



The case was tried by the court without a jury. As a principal ground for reversal the defendant urged that the court erred in awarding more than nominal damages for the reason that the record contains no evidence of the market value of the material specified in the contract. Two witnesses testified on this question for the plaintiff. Bob Stern, one of these witnesses, testified as follows:

"The Court: When you say \$37 what do you mean by that?  
 A. Average all the way through.  
 Q. Miscellaneous?  
 A. Yes, miscellaneous. \* \* \* This particular scrap was better than the ordinary because there were rails in it. There was usable shafting, usable pulleys and cast iron. \* \* Ninety per cent of it was that material."

Again he said, referring to the amount of material at the plant:

"There was 150 tons of scrap and machinery and usable material there."

Morris Stern for the plaintiff testified that:

"There was quite a good deal of usable material in the pile. The 'T' - rails are usable, we sell them again. All the other usable material was the railroad rails, the shafting, the pulleys, the hangers, pipes and plates. There was a difference in the market price in these last named commodities as compared with the average run of scrap iron or steel. Some of that stuff is \$50 a ton - \$60. Shafting is worth \$60 a ton. Rails are worth \$50 a ton, pipe \$60 to \$70 a ton. They vary in price all the way up to \$90, \$60 and \$70, and scrap iron itself is less.

There were 'T' rails there, railroad rails, shafting, pulleys, pipe, plates or sheets, the same as plates. All of these articles was second-hand, usable material. I should judge there was about 25 per cent scrap there."

Both of these witnesses admitted that there was a recognizable difference between what was described in the evidence as scrap and usable material. Bob Stern testified "there is a distinction between scrap and usable material." Morris Stern said "Usable material we call second-hand material." The court held as a matter of law that the term "scrap iron and steel" did not include such material as rails, pulleys and shaftings. The contract on its face did not require defendant to deliver material other than that specifically specified therein, namely, scrap iron and

The first of these is the fact that the  
 system is not a simple one. It is a  
 system of many parts, each of which  
 has its own function, and which must  
 be coordinated with the others in order  
 to achieve the overall purpose of the  
 system.

The second of these is the fact that the  
 system is not a static one. It is a  
 system which is constantly changing, and  
 which must be able to adapt to these  
 changes in order to remain effective.

The third of these is the fact that the  
 system is not a closed one. It is a  
 system which is constantly interacting with  
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 to remain effective.

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steel, and it is apparent from the testimony of plaintiff's witnesses <sup>that</sup> / from 75 to 90 per cent of the 100 tons of material consisted of shavings, pulleys, rails and other second-hand usable material.

Standing on the testimony of plaintiff's witnesses alone, it is clear that the testimony given as to the market value of scrap iron or steel is of such character that it is impossible to say from the record what the value of this scrap material was within the thirty day period referred to in the contract. Both plaintiff's witnesses say that in fixing the market value at \$37 per ton they included not only scrap material but also a large percentage of material which the evidence shows was not scrap, but usable or second-hand material, and that part of this second-hand or usable material was worth as much as from \$50 to \$60 per ton. The evidence of plaintiff's witnesses quoted above shows how impossible it is to arrive at any conclusion from the evidence as to what loss, if any, the plaintiff sustained by the alleged breach of the contract. It is our opinion that the evidence wholly fails to show the market price of the scrap iron or steel contracted for at the time and place provided for in the contract for its delivery to plaintiff.

In the case of Staley et al. v. Lyman, 151 Ill. App. 137, the court said:

"It follows that there was no data on which actual damages, if any, could be computed, and nominal damages only were recoverable."

We are unable to agree with the statement in the brief of counsel for appellee that plaintiff's witnesses testified to a definite market price for the material contracted for. They do give the market value of scrap iron and steel, but the testimony of these witnesses as abstracted very definitely discloses a





Bob Stern testified as follows:

"I cannot tell you to the inch the circumference of the base of the pile that had the shafting and the pulleys - - I can tell you pretty close as to feet. It was scattered around about ten feet wide and about 7 to 8 or 10 feet square. Sixty-five to 70% of it was usable material. Sixty to 70% of the material that was in the last three piles in the yard at office side of the street was usable material."

The judgment of the Municipal Court will be reversed and judgment will be entered here in favor of the plaintiff for the sum of \$1.00 with costs here and in the trial court in favor of defendant.

REVERSED AND JUDGMENT HERE.

Holdom, P. J., and McSurely, J., concur.

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AV. BOLIVAR 150  
CARACAS 1010  
VENEZUELA

THOMAS JASPER, doing business  
as HUGAR L. JAYNE & CO.,  
Appellee,

vs.

WILLIAM G. MCADOO, Director  
General of Railroads,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 639

MR. JUSTICE DYER DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment of the Municipal court of Chicago against the defendant for the sum of \$246.92.

The case was tried with a jury. It is alleged in the statement of claim that on January 11, 1918, plaintiff caused to be delivered to defendant at Saginaw, Michigan, twenty-four galvanized steel barrels filled with mineral water, of a total value of \$275.75, for shipment to plaintiff at Chicago; that the shipment was frozen when received at Chicago, to the damage to plaintiff in the sum of \$246.92. In its affidavit of merits the defendant denied any negligence causing the damage to the shipment, and he alleged that any damage sustained thereby was caused solely by an act of God, consisting of an unprecedented blizzard and snow storm, accompanied by extremely low temperatures, which occurred after the shipment was received.

The evidence introduced on the trial shows that the shipment was received by the Michigan Central Railroad at Saginaw, Michigan, on January 11, 1918, and that it arrived in Chicago on February 6, 1918.

Complaint is made by the defendant upon the rulings of the trial court with regard to the admission of testimony



The following information is provided for your reference:

1. The data was collected from a series of experiments conducted over a period of six months.

2. The results show a significant correlation between the variables studied.

3. The data suggests that the process is highly sensitive to changes in the input parameters.

4. The findings are consistent with the theoretical model proposed in the literature.

5. The data indicates that the system is stable under the conditions tested.

6. The results are subject to the limitations of the experimental setup.

7. Further research is required to confirm the findings and explore the underlying mechanisms.

8. The data is available for review and analysis.

9. The results are presented in the attached report.

10. The data is confidential and should be handled accordingly.

11. The results are subject to change based on further analysis.

12. The data is for internal use only.

13. The results are not to be distributed without prior approval.

14. The data is the property of the organization.

15. The results are to be kept secure.

16. The data is to be used for research purposes only.

17. The results are to be used for internal communication.

18. The data is to be used for reporting purposes.

19. The results are to be used for decision-making.

20. The data is to be used for strategic planning.



tending to prove that a certain other shipment, not involved in the proceedings, left Saginaw, Michigan, on January 30, 1918, and arrived in Chicago on February 9, 1918. We are inclined to agree with the contention that this evidence was not admissible to show negligence on the part of defendant, but we do not rest our decision of reversal upon this ground, as the evidence shows beyond any question that the delay in delivery of the shipment was caused by conditions which were wholly unprecedented and which in reason it would be unjust to require the defendant to guard against in such manner as to protect the shipment from freezing. The evidence is practically uncontradicted that on the day following the receipt of the shipment at Saginaw, Michigan, a severe snow storm set in and that the temperature dropped to about fifteen degrees below zero. The witnesses for the defendant, eleven in number, were unanimous in testifying that the period which elapsed between the receipt of the goods and the arrival thereof in Chicago was attended by not only unusual but by practically theretofore unknown weather conditions for the section of the country through which the shipment moved to Chicago. A train dispatcher for defendant said, and his testimony is well supported by that of all of the other witnesses, that:

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"Not only was it <sup>n</sup>very severe snow storm, but the thermometer dropped so low that it was almost impossible to clear the tracks with our snow plows and flanges. \* \* \* On January 12, 1918, we had \* \* \* no westbound passenger trains except four passenger trains which were on the road during the storm, and which tied up, three at Niles and one at Salamanca. \* \* \* On the morning of the 12th we started our local accommodation train from Salamanca, which left there at 8:30 A. M. It stalled in the snow west of Wheatfield and we didn't get them out of there until the morning of the 13th, two days later."

Another train dispatcher for defendant testified as follows:



"The worst storm that I ever experienced in my railroad career began on January 11, 1918. It started in the afternoon of January 11th and the blizzard itself continued into the night of January 12th, followed by extremely cold weather on the 13th. It was a regular blizzard. Snow averaged probably from a foot to four feet in the cuts and other places. The effect of the storm was to cause an entire blockade of traffic from the night of January 11th until about the 16th."

Mr. O'Keefe, Assistant General Superintendent of the Michigan Central Railroad, testified:

"As to the severity of the storm, I would say it was the worst storm that I had experienced or observed since my connection with the Michigan Central, which covers about thirty-seven years. In regard to the congestion of cars, I can say that we were doing a very heavy business during that period - in fact we were carrying our peak load at that time. With the weather conditions as they were, all terminals were congested by reason of embarrassment incidental to storms."

On the whole evidence in the record it is clear that the storm which for some days blocked traffic on the railroad was in a legal sense an Act of God.

In the case of Rosack v. Southern Railway Co., 161

N. Y. S., 117, 119, the court said:

"If the wine in the present case was frozen by reason of an unrepresented fall in the temperature which the carrier could not reasonably be expected to foresee, it is quite evident that the damage occurred through an Act of God, and no delay on the part of the carrier, even if negligent, contributed to this damage. The destruction of the wine by freezing through the Act of God differs logically in no respect from the destruction of roads through a flood by Act of God."

In Hall v. Union Pacific Railroad Co., 177 Ill. App.

374, the court said:

"An unusually heavy or severe storm of snow of such violence as to obstruct the moving of the carrier's trains or other vehicles, falls within the exception of the Act of God and the carrier, if guilty of no contributory negligence, will be exonerated from liability for loss or injury thereby occasioned."

The evidence shows that a refrigerator car in good condition had been ordered and furnished plaintiff. This car had no heater service and the evidence tends to show that such service was not in any case furnished by the Michigan Central Railway

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Company, and further that plaintiff had made no request for this service. The evidence is uncontradicted that at the time the storm set in, after the shipment was received, the railroad was doing its peak load of business; that because of the storm its terminals and sidings became badly congested; its freight yards were crowded with cars and when, some days after the storm subsided and cars could be moved, passenger trains and perishable products were given preference; that the car in which the shipment in question was placed was kept in the Saginaw yards for some days and at the earliest practical opportunity was started on its way to Chicago; that when it reached Jackson, Michigan, on the first freight train which left Saginaw after the storm, it was caught in the congestion and could not be moved until January 31st; that it was then sent to Chicago and was compelled to move through a badly congested district, which resulted in further delay.

We think the defendant should have been permitted to introduce evidence which was ruled out by the court as to the actual traffic conditions on the railroad from Niles, Michigan, to Chicago. But this error is not important because, as stated, it is our opinion that the evidence shows without question that defendant had done all that was reasonably possible to forward the shipment to plaintiff within a reasonable time after it was received at Saginaw, Michigan, and that the delay in the delivery thereof at Chicago was caused by an Act of God.

The goods were shipped in a refrigerator car in good condition, and the freezing thereof was caused by the same conditions which rendered it practically impossible to deliver the shipment at Chicago without the delay which actually occurred.

As held in Railroad Company v. Harvey, 77 U. S.

176, a common carrier assumes all risks except those caused by





an Act of God and the public enemy, and the most frequent defense made, where an Act of God is set up as such, are in cases involving snow storms and floods.

The shipment in question was an interstate shipment, and defendant's liability is governed by the rules laid down in the Federal courts. It may be assumed in the present case that the plaintiff made out a prima facie case, but the evidence introduced on behalf of the defendant met this case so completely that a judgment should have been entered by the trial court in his favor. The defendant's evidence shows that the failure to deliver the shipment within the usual or reasonable time was caused by an Act of God. The burden, then, rests upon the plaintiff to show, if he can, that notwithstanding this evidence defendant's negligence contributed to cause the damage complained of. Transportation Company v. Bower, 78 U. S. 129, 133. The evidence introduced on this question was insufficient to charge the defendant with negligence, as the undisputed evidence introduced for the defendant shows that the car was moved as promptly as the weather conditions would permit.

In the case of Germack v. N. Y. F. R. & N. H. Co., 196 N. Y. 442, it is said that heavy snow storms unprecedented or unusual, and extraordinary freshets or floods, earthquakes, and the like, are Acts of God most frequently interposed as a defense in suits similar to the one at bar, and that the decisions are numerous which hold that an unusual or unprecedented snow storm is an Act of God which will relieve a common carrier of goods from liability for delay in delivery.

There can be no doubt on the record before us that the freezing of the shipment was caused by the unusual weather conditions, and that the freezing might not have taken place had



the evidence indicates that the failure to deliver within the usual time was caused by conditions which were in no sense properly chargeable to defendant.

The judgment of the Municipal court will be reversed with a finding of facts.

JUDGMENT REVERSED WITH A  
FINDING OF FACTS.

Heldom, L. J., and McSharely, J., concur.

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AMERICAN BREAD WRAPPER COMPANY,  
a corporation,  
Appellant,

vs.

JOHN A. ANDERSON and C. A.  
GUSTAFSON, doing business as  
ANDERSON & GUSTAFSON,  
Appellees.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 640

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In an action for damages brought by plaintiff against defendants for an alleged breach of a contract entered into October 31, 1918, it was charged that under the contract defendants were required to sell and deliver to plaintiff "at once" a 20 ton car of wax not to exceed 45,000 pounds.

The order for the shipment was actually given on November 1, 1918, and a car of wax arrived at plaintiff's plant on December 2, 1918. On November 12, 1918, plaintiff notified defendants that as the wax had not arrived it was compelled to and did purchase wax in the open market and that plaintiff would hold defendants for the difference between the contract and the market price. In answer to this communication the defendants insisted that they had ordered prompt shipment of the car of wax and would insist upon its acceptance upon its arrival in Chicago. The car/contained 40,115 pounds of wax when received in Chicago on December 2, 1918, was accepted and paid for by plaintiff. Between November 12, 1918, and November 23, 1918, the plaintiff purchased 15,791 pounds of wax, of a somewhat different grade than that contracted for, at an advance of 2¢ per pound over the contract price. Judgment was entered in favor of the defendants and plaintiff brings the case to this



court by appeal.

The jury which tried the case was instructed to return a verdict in favor of plaintiff for \$1.00 and costs. It is inferable from the record that the trial judge was of the opinion that the acceptance of the goods and the paying therefor by plaintiff precluded it from setting up any loss it might have sustained by reason of delay in delivery.

Section 41 of the Uniform Sales Act, Illinois Revised Statutes 1917, makes it the duty of a buyer of goods to accept and pay therefor when delivered in accordance with the terms of a contract. Section 49 of the Act provides:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale.

The record does not disclose that there was either an express or implied agreement by the parties to the suit that the acceptance by plaintiff of the shipment and the paying therefor was to be regarded as a waiver on its part of its right to recover damages for a breach of the contract which the trial judge found actually occurred. The evidence does disclose such delay in the delivery of the goods as would warrant the submission to the jury of the question of damages occasioned thereby, if any, and this is so, even though it be admitted that the defendants had a right to deliver the goods within a reasonable time after the making of the contract and not "at once" as insisted upon by the plaintiff.

The decided cases cited in the briefs of counsel sustain the argument that a buyer who accepts and pays for goods may retain a right to collect damages for delay in delivery thereof if the circumstances show that it was not his intention to waive the right at the time the goods were

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accepted and paid for. There is nothing in the record before us tending to show that the plaintiff when it accepted the goods in question did so with an intention to waive a right to recover damages for delay in delivery. It insisted at all times upon its right to recover damages therefor, and aside from the statute quoted above, which we think reserves the right to plaintiff to bring his action, the decided cases and text writers cited do not in the main hold for a principle, in view of the evidence in the record that would authorize the trial judge to instruct the jury, as he did, that the plaintiff could recover only nominal damages for the delay in delivery of the shipment. As held in the case of Ramsey et al. v. Tulley et al., 12 Ill. App. 463, the question of waiver is usually one of intention, each case depending upon its peculiar facts.

The question of plaintiff's damages, if any, by reason of the breach of the contract should have been submitted to the jury under proper instructions. Indeed, it was not only the right but it became a duty of the plaintiff, in mitigation of the damages, to use reasonable effort to purchase the wax in the open market when it became evident that delivery was not to be made in accordance with the terms of the contract. Corn Planters Co. v. Jenkins, #24795 Ill. Appellate Court (not yet reported).

It is insisted on behalf of the defendant that the evidence shows that the goods were to be shipped from a point distant from the City of Chicago, and that, hence, the true measure of damages was the difference between the contract price and the market price of the wax at the point of shipment. The evidence does not disclose whether the goods were to be shipped at or from Chicago, or from some other point. The contract between the parties was entered into in Chicago, which seems to be the residence of all of the parties to the suit. Freight





charges on the shipment were to be allowed to Chicago. We assume this means allowed to the plaintiff. In a letter to plaintiff defendants stated:

"We are issuing instructions to refinery to make shipment and trust goods will go forward at once, and reach you in the shortest possible time. As soon as the car number and shipping date are known, we will advise you by telephone."

While the evidence is somewhat vague and uncertain we are not prepared to hold, for the purpose of determining the proper measure of damages, that the material was to be shipped from an unknown point beyond the limits of the City of Chicago. The defendants appear to be engaged in business in Chicago and they assumed a contract for the delivery of the wax to plaintiff, which did not provide for the shipment from any particular point, other than Chicago.

The testimony of the only witness who testified, Mr. Peterson, called on behalf of the plaintiff, is to the effect that because of the failure of the defendants to deliver the wax, he, or his company, was compelled to purchase it in the open market and that "the market price of such wax was 12.11 cents." He also testified that there was very little, if any difference between the wax purchased during the month of November and that contracted for with defendants. This witness did affirm that there was no difference in the market price of wax in car load lots and less than car load lots that he knew of. The evidence shows the existence of the contract. The court held on the evidence that there had been a breach thereof and it is our opinion that the evidence introduced touching the question of damages and market price should have been submitted to the jury.

The judgment of the Municipal Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Holdom, P. J., and McSurely, J., concur.



ALEXANDER LIPPS,  
Appellee,

vs.

ANTON J. CIERMAK, Bailiff of  
the Municipal Court of Chicago.  
On Appeal of ANNA L. MCCOID,  
Appellant.

APPEAL FROM THE CIRCUIT  
COURT OF COOK COUNTY.

221 I.A. 640

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendants appeal from an order entered in the Municipal court of Chicago is a suit brought by plaintiff for an alleged wrongful levy on an automobile said to be the property of the plaintiff.

After the entry of judgment motion was made by the defendant, Anna L. McCoid, to vacate the judgment as to her. A demurrer filed to the declaration was withdrawn and thereafter a plea of the general issue was filed on behalf of both defendants by Otto G. Bentner and W. J. O'Donoghue, "their attorneys." The record further shows that the trial judge, on March 13, 1919, entered the following order:

"This cause being called for trial, come the parties to this suit by their attorneys respectively.

Thereupon on motion of Arthur B. McCoid, Esq., it is ordered that leave be and the case is hereby given to enter his appearance as attorney for the defendant, Anna L. McCoid, and issues being joined herein, it is ordered that a jury come."

In an affidavit in support of the motion to vacate the judgment Anna L. McCoid stated that she had never been served with a summons or notice of any kind of the pendency of the suit; that she had never employed Arthur B. McCoid to represent her therein and had never at any time employed any attorney to appear for or to represent her in the cause. A





partial transcript of the evidence heard upon the trial shows that Arthur B. McCoid appeared in the trial of the cause, when requested by the court to state when he appeared for he answered "myself and" (indicating). Mr. Bentner testified that he represented Anton J. Cernak, Bailiff of the Municipal court of Chicago, in the cause; that he knew Mr. McCoid, but had never seen or met his wife, Anna L. McCoid; that he had never been employed to represent her in the suit; that he personally did not know that he had entered the appearance of Mrs. McCoid in the cause; that he had about 1,200 lawsuits pending against Mr. Cernak; that the summons in the present case had been turned over to a girl in his office who had charge of watching the cases; that he had mailed a form letter to Mr. McCoid at the beginning of the pendency of the suit, that he did not have authority from anybody, either Anna L. McCoid or anybody representing her, by conversation or otherwise, to enter her appearance; that the appearance was entered by inadvertence before he talked with Mr. McCoid.

On motion to vacate it was objected that the affidavit filed on behalf of the defendant Anna L. McCoid was unbelievable and in material points untrue; that Arthur B. McCoid, husband of Anna L. McCoid, upon the trial of the cause had obtained leave of court to appear for her and represent her as associate counsel with other attorneys in the case.

It is conceded that the defendant Anna L. McCoid was not served with process in the suit, and the judgment against her must be vacated unless it appears from the record that she appeared therein either by herself or by some person authorized by her to represent her. The evidence is uncontradicted that the attorneys who filed the appearance in the cause had no authority to represent Mrs. McCoid and the affidavit



filed on motion to vacate satisfactorily shows that their appearance therein for defendants was, as to Mrs. McCoid, filed inadvertently. The record does show that Arthur B. McCoid had permission of court to file her appearance, but it does not disclose that he acted upon this authority. No appearance in fact was filed at any time on behalf of Mrs. McCoid by her husband, Arthur B. McCoid. She states, and so does he, in affidavits that he had no authority to represent her or to file any appearance in her behalf in the suit. The fact that the relation of husband and wife existed between Mr. and Mrs. McCoid might give some ground for suspicion that he had authority to represent her or to employ attorneys to act for her. But whatever may be said or thought in this connection, the affidavits filed on her behalf definitely charged that he had no such authority.

A partial transcript of the record discloses that counsel for plaintiff made an ineffectual effort to compel Mr. McCoid to inform the court as to his authority to appear in the case and as to whom he represented therein. The record does not show that Mr. McCoid in fact assumed to appear on behalf of Mrs. McCoid.

The case of Franklin Savings Bank v. Taylor, 131 Ill. 376, appears to be in point. In that case the Supreme Court said:

"Appellee was not made a party to the petition for mechanics lien, no one assumed to answer for her. She denies that she ever authorized George Taylor, her husband, to appear for her or employ counsel to represent her in that proceeding - or, indeed, that she ever knew of the pendency of that proceeding until since the deed sought to be set aside was executed; and there is no evidence in the record tending to contradict her in this respect. There is no proof that George Taylor was the universal agent of appellee, with full power to act, and bind her estate in all instances in which it was the subject of litigation, and proof that he acted with her approval in a few instances, manifestly is no evidence that she would approve his acts in all instances."

It cannot be presumed that because the relationship of



husband and wife existed between Mr. and Mrs. McCoid that he had any general authority arising therefrom to represent her as her attorney or agent. She cannot be held to any liability for his unauthorized acts touching her separate property, and that he was unauthorized to act for her is uncontradicted upon this record.

Wallace v. Monroe, 22 Ill. App. 602.

The order of the Circuit Court will be reversed and the cause will be remanded to that court with directions to take such further proceedings in the cause as will be in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Holdom, P. J., and McSurely, J., concur.



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J. BROWN,  
Appellee,

vs.

A. E. FORD and T. A. HARMON,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 T. A. 640

MR. JUSTICE SEVER DELIVERED THE OPINION OF THE COURT.

Suit was begun by plaintiff in the Municipal court of Chicago to recover the value of certain goods which it was alleged had been stolen from his room in a hotel operated by defendants.

It was charged in the statement of claim that plaintiff was a guest of the hotel; that "on the 8th day of April, 1920, upon leaving the room he did in accordance with the rules of said hotel deposit the key to his said room;" that upon his return to the room he discovered that it had been entered and certain articles stolen "to the value to the plaintiff in the sum of \$175.00." The only point made is that the statement of claim is insufficient to support the judgment.

On the trial, without a jury, the court found the issues against the defendant and assessed plaintiff's damages at the sum of \$147. Judgment was entered for this amount and defendant brings the case here by appeal. It appears from the abstract of record that the parties went to trial upon the statement of claim; that thereafter the defendants filed an affidavit of merits. This affidavit of merits denied that the relation of inn keeper and guest "was established." No objection was made on the trial to the sufficiency of the statement of claim, and it is our view that the objections thereto presented in this court for the first time come too late. In the absence of a bill of exceptions or statement of facts, we must assume that the

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evidence heard on the trial was sufficient to support the judgment. The statement of claim charges that the hotel was kept by the defendants and that property was taken from plaintiff's room of the value to him of \$175.00; these allegations, in the absence of objection properly made at or before the trial, are sufficient to sustain the judgment.

It is inferable from the allegations of the statement of claim that the property in question was in the possession of the plaintiff, and proof of the damage to him by reason of the loss of the goods was, we must assume, introduced on the trial. Whether his interest in the property was qualified or absolute in the state of the record before us is not important. Gross v. Saratoga European Hotel & A. Co., 176 Ill. App. 160-164; Scola et al. v. Scola, 194 Ill. App. 336-8.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Holden, P. J., and McGarely, J., concur.





WILLIS I. ROBERTS, Administrator  
of the estate of SAMUEL C. ROBERTS,  
deceased,

Appellant,

vs.

THOMAS A. SHERIDAN,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 640

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, as administrator of the estate of Samuel C. Roberts, deceased, brought suit in the Superior Court of Cook County against the defendant, Thomas A. Sheridan, a police officer of the City of Chicago.

The declaration which consisted of two counts charged that the defendant negligently and carelessly fired a revolver then in his possession, as result of which the deceased came to his death. The case was tried before a jury which returned a verdict in favor of defendant and judgment was entered thereon which plaintiff seeks to reverse by appeal to this court.

Evidence introduced on the trial tends to prove that the deceased, Samuel C. Roberts, accompanied by three friends, on the evening of the 9th day of February, 1919, was walking along Madison street near Ashland avenue in the City of Chicago; that the defendant at the time was also proceeding along Madison street having in custody a young man named Lafferty; that at the time the shooting took place many persons were walking along and upon Madison street sidewalks. Albert Cheffer, a witness for the plaintiff, testified that he saw the defendant leading a young fellow along the street; that he heard a shot fired just after defendant's prisoner had started to run away from him; that at this time deceased was about eight feet in front of the



witness and the defendant was behind him; that defendant started to run after his prisoner and that thereafter the witness heard two or three shots fired. The defendant called as a witness for himself was held by the trial judge to be an incompetent witness in his own behalf.

One Lafferty, a police officer, testified that at the time the shots were fired he was standing at a patrol box in the immediate vicinity; that he was in charge of a prisoner at the time; that he heard seven or eight shots fired "pretty rapidly, taking about three minutes." This witness also testified on cross examination that Lafferty, who evidently had been re-arrested, when searched at the police station sometime after the shooting did not have any weapons in his possession.

We are unable to say that the finding of the jury is not supported by the evidence heard upon the trial. Only two witnesses, Cheffer and Lafferty, testified as to what occurred at the time of the shooting; one of these said that three or four shots were fired. The other testified that seven or eight shots were fired, and there is evidence tending to prove that Sheridan was armed with a revolver containing but six chambers. The evidence does disclose that the deceased was peaceably passing along a public street, but whether his death was in fact caused by the act of the defendant or by some other person was a question of fact which we think was fairly submitted to the jury. The evidence does not disclose why Lafferty had been placed under arrest in the first instance, nor is it clear from the record that he, Lafferty, did not fire the shot which caused the death of deceased.

The evidence of one witness, if believed by the jury, would warrant a finding that deceased fell immediately after the first shot had been fired, but we are unable to say from all the evidence in the record that the defendant was guilty of the negligence charged





against him in the declaration, or that he in fact committed the act which caused such deplorable consequences.

It is our opinion that questions of fact presented by the pleadings were properly submitted to the jury. The court did not err in refusing to give to the jury the following instruction:

"Though a peace officer may discharge a weapon under the circumstances stated, and his act be justified, if, however, the shooting was done in a public place, where the officer understood or should have known that people were in the habit of congregating or were likely to pass, the act might constitute such negligence as to render the officer civilly liable for any injury that he might afflict upon an innocent person."

This instruction undertook to tell the jury what acts or facts might constitute such negligence as would render the defendant liable in the action and for this reason it was properly refused.

Reversible error was not committed on rulings on the admissibility of evidence.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

Holden, P. J., and McMurphy, J., concur.





BANK OF COMMERCIAL AND SAVINGS,  
a corporation,

Appellee,

vs.

A. C. TOLTE,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 640

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment for \$459.33 was entered in favor of the plaintiff in the Municipal court of Chicago on a promissory note dated February 28, 1917. The note with an endorsement thereon is as follows:

"\$400.00

Chicago, February 28, 1917.

On March 1, 1918, after date---I---promise to pay to the order of---William W. Deans---Four Hundred and no/100----Dollars at 5201 Warner Avenue. Int. at 5% per annum. Value received.

No. 652 Due March 1, 1918

A. C. Toldt

Endorsed -- W. W. Deans."

The evidence shows that Deans, the payee named in the note, presented it for discount at plaintiff's bank March 30, 1917. The note as originally drawn contained no provision for the payment of interest, and at the time of its presentation for discount there appeared thereon written in ink the following: "Int. at 5% per annum."

The case was tried before the court without a jury and the court found as facts in the case:

"that the defendant was present at the time the note was so discounted and knew that the words 'interest at 5% per annum' were then upon said note and thereby ratified the act of inserting said words upon said note by making no objection to said note being discounted with said words thereon."

The court finds specially as facts in this case that at the time of execution and delivery of the note in question to Deans it did not contain the words 'interest at 5% per annum;' that said words were inserted in said note after the execution and delivery thereof without the consent of Toldt, but the court further finds that just prior to and

DECEMBER 1900



The following table shows the results of the observations made during the month of December 1900. The observations were made at the station of the U. S. Fish Commission, and the results are given in the following table.

| DATE   | TIME  | TEMPERATURE | WIND | SEA | SKY | MOON | STARS | PLANETS | COMETS |
|--------|-------|-------------|------|-----|-----|------|-------|---------|--------|
| Dec 1  | 10:00 | 50          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 2  | 10:00 | 55          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 3  | 10:00 | 60          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 4  | 10:00 | 65          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 5  | 10:00 | 70          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 6  | 10:00 | 75          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 7  | 10:00 | 80          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 8  | 10:00 | 85          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 9  | 10:00 | 90          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 10 | 10:00 | 95          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 11 | 10:00 | 100         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 12 | 10:00 | 105         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 13 | 10:00 | 110         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 14 | 10:00 | 115         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 15 | 10:00 | 120         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 16 | 10:00 | 125         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 17 | 10:00 | 130         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 18 | 10:00 | 135         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 19 | 10:00 | 140         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 20 | 10:00 | 145         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 21 | 10:00 | 150         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 22 | 10:00 | 155         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 23 | 10:00 | 160         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 24 | 10:00 | 165         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 25 | 10:00 | 170         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 26 | 10:00 | 175         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 27 | 10:00 | 180         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 28 | 10:00 | 185         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 29 | 10:00 | 190         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 30 | 10:00 | 195         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 31 | 10:00 | 200         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |

The following table shows the results of the observations made during the month of December 1900. The observations were made at the station of the U. S. Fish Commission, and the results are given in the following table.

| DATE   | TIME  | TEMPERATURE | WIND | SEA | SKY | MOON | STARS | PLANETS | COMETS |
|--------|-------|-------------|------|-----|-----|------|-------|---------|--------|
| Dec 1  | 10:00 | 50          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 2  | 10:00 | 55          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 3  | 10:00 | 60          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 4  | 10:00 | 65          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 5  | 10:00 | 70          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 6  | 10:00 | 75          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 7  | 10:00 | 80          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 8  | 10:00 | 85          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 9  | 10:00 | 90          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 10 | 10:00 | 95          | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 11 | 10:00 | 100         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 12 | 10:00 | 105         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 13 | 10:00 | 110         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
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| Dec 16 | 10:00 | 125         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 17 | 10:00 | 130         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 18 | 10:00 | 135         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 19 | 10:00 | 140         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 20 | 10:00 | 145         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 21 | 10:00 | 150         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 22 | 10:00 | 155         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 23 | 10:00 | 160         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 24 | 10:00 | 165         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 25 | 10:00 | 170         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 26 | 10:00 | 175         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 27 | 10:00 | 180         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 28 | 10:00 | 185         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 29 | 10:00 | 190         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 30 | 10:00 | 195         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |
| Dec 31 | 10:00 | 200         | W    | 1/2 | B   | 1/2  | 1/2   | 1/2     | 1/2    |

The following table shows the results of the observations made during the month of December 1900. The observations were made at the station of the U. S. Fish Commission, and the results are given in the following table.

at the time said note was discounted by plaintiff bank, that the said Toldte and Deans were present in plaintiff bank and that Toldte then knew that said note contained the words 'interest at 5% per annum' prior to the time plaintiff accepted said note for discount."

A judgment was entered on these findings in favor of the plaintiff, and the sole question before us is whether the trial court erred in concluding that the facts so found were sufficient to warrant the finding that defendant had ratified the unauthorized act of alteration of the note.

The evidence introduced on behalf of plaintiff tends to prove that Toldte, the defendant, was present with Deans at the time the note was discounted at the bank on March 30, 1917; and that it then contained a provision written in pen and ink for the payment of interest; that at the time the note was presented the defendant stated that it was given by him to Deans as part of the purchase price of a piece of real property.

The defendant denied that he was present at the time the note was discounted, although two witnesses contradict him as to this. On this point the trial court was in a much better position to determine the question of fact involved than are we. It is asserted, however, that the testimony does not tend to prove that Toldte knew that the note contained the words "Interest at 5% per annum" at the time it was accepted by plaintiff. The trial Judge found otherwise. We think the evidence warrants the conclusion that plaintiff received the note in due course, for a valuable consideration and without any knowledge of any defense that might be made to an action thereon, and, as stated, it received the note and paid value therefor in the presence of the defendant who, according to testimony, thereafter promised to pay it. The evidence does show that the note as originally drawn contained a blank space after the words and figures "#5201 Warner Avenue," and that the provision for the payment of interest was written into this space.





It is conceded that the note in question was the obligation of the defendant. A note taker for plaintiff testified that the defendant had promised to take care of the note. The evidence does not show that the plaintiff was in any degree guilty of negligence, and whatever might otherwise be said as to the conduct of defendant, we think on the whole record the trial Judge was warranted in finding that he knew that the interest provision had been written into the note at the time of its presentation to plaintiff. One witness for plaintiff testified that defendant "represented himself as being the giver of the note, and the way it was given was discussed in his presence."

In the case of Hefner v. Dawson, 63 Ill. 403, the court said:

"This case, in its main features, is much like the one of Hefner v. Vandalah, 62 Ill. 403, except that there is more in the conduct of the defendant, and the circumstances in the present case as testified to, which partakes of the character of an estoppel in pais, than there was in the former one, and there is a conflict of testimony here which did not there exist. There was evidence in the present case which went to show, and would sustain the finding of the court to that effect, that the defendant not only adopted and ratified the signature of his name upon the note, but that, by his admissions and declarations that the note was 'all right,' and that if plaintiff would 'hold still' he would pay him, he knowingly and designedly induced the plaintiff to omit taking any measures to collect the note of Goman \*\*\*."

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holden, P. J., and McSurely, J., concur.



ANGELO VINTALORO,  
Appellant,

vs.

TOM PAPPAS, WILLIAM HULIAROS  
and GUST HULIAROS,  
Appellees.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 641

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, being the owner of premises in the City of Chicago known as No. 1658 West Twelfth street, on the 15th day of January, 1919, made a lease for the first floor thereof, which lease was, with the consent of plaintiff, assigned on the 11th day of July, 1919, by the lessees to defendants. It was provided in the lease that "no piano playing, singing or other form of amusement shall be kept and maintained" in the premises without the written permission of the lessor; that the lessees were to insure certain plate glass on the premises and that the policies for such insurance were to be delivered to the lessor.

Evidence introduced upon the trial tends to prove that notwithstanding the provisions of the lease defendants permitted piano playing on the premises during the day and at times at night until as late as from twelve to two o'clock, and that they failed to comply with the provisions of the lease with respect to procuring insurance policies upon the plate glass. One of the defendants, called as a witness for plaintiff, testified that defendants had a piano in the premises "last year and also during the months of April, May and March of this year;" that it was played until eleven o'clock at night. The plaintiff testified that he heard piano playing during the months of March, April and May; that "it was a great big electric piano; it plays very loud, just like a sledgehammer."



Other evidence was introduced in support of plaintiff's contention that the lease had been violated with respect to piano playing on the premises. The building in which the leased premises is located is a three-story building consisting of a store on the first floor and flats on the second and third floors.

June 16, 1920, plaintiff served a written notice upon defendants of plaintiff's election to terminate the lease on the 28th day of June, 1920, because of failure on the part of defendants to comply with its terms. On failure of defendants to deliver possession of the premises as demanded by the notice, an action for forcible detainer thereof was begun in the trial court. At the close of plaintiff's evidence the court on motion of defendants directed the jury to find a verdict in favor of defendants. Judgment was entered on the directed verdict and plaintiff brings the case to this court by appeal.

It is our opinion that the trial court erred in instructing the jury to find for the defendants. The evidence in the record tends to sustain the position taken by plaintiff that defendants had violated the terms of the lease, both as regards piano playing in the premises and as to the failure of defendants to insure the plate glass. The building was used in a large part for residence purposes and the provision in the lease which prohibited piano playing therein was reasonably necessary to render the premises fit for such use. Part of the testimony tends to show that the wife of one of the tenants was ill during the time that the piano was played on the premises, sometimes as late as twelve o'clock at night, and that the tenants had objected to the disturbance and annoyance thereby created.

We do not think the evidence tends to show that the lessor intended by the receipt of rent to waive his right to declare a forfeiture of the lease. Clause 21 of the lease was





changed after the assignment thereof to defendants or as to require the defendants to deposit \$1,000 as security for rent, said sum to be held by the lessor until the expiration of the term, namely, until April 30, 1921. This sum was deposited with the lessor under a clause which provided that at the expiration of the term, if all the conditions and covenants of the lease had been fully complied with, then the sum was to be returned to the defendants, and that if any of the conditions and covenants of the lease had been broken, etc., then the lessor shall be permitted to "retain the sum of one thousand dollars until any differences between said parties shall have been adjusted by settlement or suit."

It is said by counsel for defendants that if the lessor is successful in the present action the one thousand dollar deposit would be kept by him, as the question as to whether appellees had violated any of the covenants would then be res judicata in a suit to recover the \$1,000. We do not intend to pass upon the validity of this contention in this opinion, further than to say that it is our judgment that the evidence introduced on the trial was sufficient to warrant a submission of the issues of fact to the jury, and that the court erred in directing a verdict in defendants' favor. The evidence tends to show that the lessor did not receive or accept rent for the premises after the service of notice of his election to terminate the lease, and there is nothing in the record before us which tends to prove that he received payment of money for rent or for any purpose which would bar him from asserting a right to terminate the lease for a violation of its terms by the assignees. Carlson v. Keerner, 226 Ill., 16; The Madinah Temple Co. v. Surray, 162 Ill. 441.

The judgment of the Municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.  
Heldom, P.J., and McSurely, J., concur.



220 - 26393

BEN STAPANSKY and PHILIP QUINN,  
Appellees.

vs.

PETER P. STAFFORD and WALTER W.  
STAFFORD,  
Appellants.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 641

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment was entered in a forcible detainer action in the Municipal Court of Chicago against the defendants Peter P. Stafford and Walter W. Stafford, and the defendants bring the case hereby appeal for review.

At the time the action was brought the defendants were in possession of a store and basement premises located at #2011 W. North Avenue, Chicago, under a lease dated July 9, 1918. This lease was assigned on April 20, 1920 to plaintiffs on a sale to them of the premises by the original lessor.

The testimony introduced for the defendants tends to prove that notwithstanding a provision of the lease which required the payment of the rent upon the first day of each month in advance, the parties thereto, by a course of conduct and dealings had so modified this provision that the rent reserved became due on the 9th day of each month.

For the defendants it is urged that the judgment should be reversed because the trial judge at the close of all the evidence introduced on the trial instructed the jury to find for the plaintiffs. The trial court did not err in giving this instruction. Checks were introduced in evidence which showed that defendants paid rent for the premises for the month of May 1920, on May 5th of that year, and that the June 1920 rent was





paid by check on the 9th of June. Walter W. Stafford, defendant, testified that the "rent was really due on the 9th of the month, because we took possession on the 9th of the month." If it be assumed that the original lessor and plaintiffs, by a course of conduct and dealings with defendants, had modified the lease so as to require the payment of rent upon the 9th day of each month, yet the evidence fails to show that the defendants had complied with the provisions of the lease as so modified.

One of the defendants, Walter W. Stafford, testified: "I did not pay the rent on July 1st, but I tendered him the rent on the 20th of this month." Philip Quinn for plaintiff testified that defendants had never offered any rent prior to July 20th, which was the day upon which the plaintiffs served notice of their intention to declare a forfeiture of the lease.

The case is easily distinguishable from the case of Donovan v. Murphy et al., No. 25544, Illinois Appellate Court, First District, (not yet reported). The questions in that case were not identical with those in the instant case. The record in the Donovan case shows that the rent was always paid on the 10th of each month and not on the first as required by the lease; the lessee in that suit had tendered payment of the rent in accordance with a constant practice of the parties on the 10th of the month. We, therefore, held in view of those facts that the lessor would not be permitted to forfeit the lease for a failure to pay the rent on a date prior to the 10th<sup>of</sup>/the month. As stated, the record here shows that no tender of the rent was made prior to the 20th day of July, and there is nothing in the evidence which would warrant a holding that the rent of the premises in question did not become due until that date. Wesen v. Hinchliffe, 131 Ill. 468.

The judgment of the Municipal Court will be affirmed.  
Holdom, P.J., and McSurely, J., concur.

AFFIRMED.



ANNA E. MONTGOMERY,  
Appellee,

vs.

H. C. WOODS,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 641

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in a forcible detainer suit brought by the plaintiff, a lessee of certain rooms in a building known as No. 5213 Cornell avenue, against defendant, who occupied the same premises under a prior written lease executed by the father of the plaintiff, Jacob E. Doerr, the owner of the building. The judgment of the court was entered upon a verdict of the jury before which the case was tried. The sole question of fact upon which the validity of the judgment is questioned is as to whether the lease between Jacob E. Doerr, the owner of the building, and the defendant, H. C. Woods, had been altered in such manner as to make it appear that the lease terminated upon the first day of May, 1900, and not upon the first day of May, 1901, as contended for by the defendant.

The defendant while on the witness stand examined a copy of the lease through a magnifying glass and he testified that the endorsement on the back had been altered since the execution of the lease by changing the figures "1901" to read "1900." The alteration made it appear that the lease terminated on the 30th day of April, 1920.

Two copies of the lease were introduced in evidence; that introduced by the defendant shows on the back thereof that the date of expiration of the lease was April 30, 1901. The date of the termination of the lease as it appears on the face of





this instrument is somewhat blurred, the typewritten figures "2-0" apparently being written over the figures "2-1" in the lease. However, the copy of the lease introduced by plaintiff and said to be the original shows very clearly upon its face, as well as on the back, that the termination date of the lease as originally drawn was April 30, 1921, and that this date, in a somewhat clumsy manner, was changed so as to make it appear that the term expired on April 30, 1920. The main disputed question of fact upon the trial was as to this change. Plaintiff's agent testified that the lease was executed for a one year term and not for two years, as insisted upon by defendant.

The evidence as abstracted gives no explanation as to why these changes were made, except that counsel for the plaintiff, when the defendant had been handed a magnifying glass to examine the lease for the purpose of testifying as to the alteration, stated: "It is not necessary, I admit that it has been changed." Both the plaintiff, who claims to be a lessee of the premises, and her father, the owner, were placed on the witness stand, but no evidence was offered to explain this admission of counsel or the change in the lease. In this state of the record, the uncontradicted testimony of the plaintiff must be taken as true, and this testimony shows that the lease, which was drawn by the plaintiff or her agent, was materially altered. On this showing we think the verdict and judgment should have been in favor of the defendant; and notwithstanding some ambiguity appearing upon the face of the copy of the lease introduced by the defendant, the admitted material alterations of the alleged original lease, coming as it did from the possession of the plaintiff, were of such character that we are compelled to reverse the judgment with a finding of fact.

The judgment of the Municipal court will be reversed and a judgment entered here in favor of the defendant.  
 Pelton, J. J., and                      REVERSED WITH FINDING OF FACT AND  
 McMurphy, J., concur.                      JUDGMENT HERE.





241 - 36414

## FINDING OF FACT.

We find as a fact that the lease under which the defendant held possession of the premises in question was altered after its execution and delivery and while in the possession or control of plaintiff, so that the termination date thereof was changed from April 30, 1921, to April 30, 1920.



256 - 26430

A. P. CALLAHAN & COMPANY,  
a corporation,

Appellee.

vs.

T. H. FLOOD & CO., a corporation,  
and L. J. FLOOD,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 641

MR. JUSTICE DYER DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered against it in the Municipal Court of Chicago for the sum of \$5,177.06. The judgment is based upon a promissory note dated Chicago, August 14, 1919, which note is as follows:

"Nov. 14-19

\$5000.00

Chicago, August 14, 1919

Three months after date we promise to pay to the order of A P Callahan & Co. Five Thousand Dollars at our office 214 W. Madison St. Value Received T. H. Flood & Co. No ..... Due 11-14-19 By L. J. Flood, Treasurer."

The note was endorsed on the back "L. J. Flood."

The only point made against the validity of the judgment is that the record contains no evidence of L. J. Flood's expressed or implied authority to execute the note. No evidence was introduced on behalf of the defendant and no denial appears in the evidence of L. J. Flood's authority to act for the defendant in execution of the note, nor did L. J. Flood, who is also a party defendant in the action, deny in an affidavit of merits, or otherwise, the execution of the note by him.

Plaintiff's evidence shows that the note was given to take up another note for the same amount. The original note having been given for liberty bonds. No objection was made to the introduction of the note in evidence, and even if



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it be assumed, as urged, that L. J. Flood, as treasurer of the defendant corporation had no implied authority as such to execute the note, a question which we do not decide, the evidence in the record is uncontradicted that at the time the note was executed by him he was not only treasurer, but also president of the defendant corporation. The note was executed by the defendant corporation by its treasurer and president. The authorities are numerous and also unanimous that "a corporation acts through its president, and through him executes its contracts and agreements, and an act pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body."

Traders Mutual Life Ins. Co. v. Johnson, 200 Ill. 364.

The plaintiff urges that the appeal in the instant case was taken solely for the purpose of delay, and that plaintiff is entitled to statutory damages therefor. We are inclined to agree with this contention and plaintiff will therefore be awarded the sum of \$250 as statutory damages for the bringing of the appeal to this court for such purpose.

The judgment of the Municipal Court will be affirmed with statutory damages in favor of the plaintiff in the sum of \$250.

AFFIRMED WITH STATUTORY DAMAGES.

Holdom, P. J., and McSurely, J., concur.



FRED RICKERT,  
Appellant.

vs.

R. F. ENGELHART,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 641

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT:

This is an undefended appeal from a judgment of the Municipal court of Chicago entered in favor of the defendant.

The cause was commenced in the Municipal court upon a transcript of a judgment for \$300 entered before a Justice of the Peace in a suit wherein the appellant here was plaintiff and appellee was defendant. It is stated that the Judge who tried the case in the Municipal court held as a matter of law that the judgment shown in the transcript, being a default judgment, was invalid and void, because on the face of the summons issued by the Justice of the Peace the claim of the plaintiff was stated to be not to exceed \$200. The Municipal court found the issues in favor of the defendant.

It is evident that the trial Judge was of the opinion that the judgment of the Justice of the Peace was void for the reason that the transcript showed that the summons issued by the Justice of the Peace on its face demanded of defendant only the sum of \$200. Section 16 of chap. 79 of Ill. Revised Statutes fixes the jurisdiction of a justice of the peace at \$300 and section 20 of chap. 79 recites, "The justice shall endorse on the back of every summons, the sum demanded of the plaintiff, with costs due thereon." The endorsement on the back of the summons issued by the Justice of the Peace showed

570.2.158



The following table shows the results of the experiment. The first column represents the time in minutes, and the second column represents the value of the function. The data points are as follows:

| Time (min) | Value |
|------------|-------|
| 0          | 1.0   |
| 10         | 0.8   |
| 20         | 0.6   |
| 30         | 0.4   |
| 40         | 0.2   |
| 50         | 0.1   |
| 60         | 0.2   |
| 70         | 0.4   |
| 80         | 0.6   |
| 90         | 0.8   |
| 100        | 1.0   |

that the plaintiff made a claim against defendant not to exceed the sum of \$300. The transcript shows that the defendant and his counsel appeared before the Justice of the Peace on four separate occasions and at defendant's request the cause was continued. An order continuing the cause was entered on their several appearances. On October 26th in the absence of defendant the case was called for trial and after hearing evidence judgment was entered in favor of the plaintiff. It is our opinion that the transcript did not show that the judgment entered by the Justice of the Peace was invalid or that he was without jurisdiction to try the cause and to enter a judgment therein.

The demand of the plaintiff, as it appears on the back of the summons, in accordance with the requirements of the statute, was for a sum of money not to exceed \$300. The judgment cannot be said, technically, to be a default judgment. The defendant appeared several times before the Justice of the Peace and requested continuances of the cause, which were granted.

In Polowski v. Kersnowski, 134 Ill. App. 410, it was said that a justice of the peace is unauthorized to render a judgment for a larger sum than that endorsed on the summons, and it was held in that case that the endorsement on the summons had the same effect and office in a justice court as has the ad damnum in a declaration in a court of record. Each limits the judgment to the amount claimed and interest thereon.

Notwithstanding the evident error on the face of the summons, the judgment of the Municipal court should have been in favor of plaintiff for the sum of \$336, which includes plaintiff's costs and legal interest on the amount found due him.

The judgment of the Municipal court will therefore be reversed and a judgment will be entered here in favor of the





plaintiff for the sum of \$258.26, which includes the sum of \$400 plus \$17.80, plaintiff's costs in the Justice court, and \$17.80 interest to December 26, 1919, and the legal rate of interest on the sum of \$335 from said December 26, 1919, to the date of the judgment entered in this court.

REVERSED AND JUDGMENT ENTERED.

Heldow, P. J., and McSurely, J., concur.



EDWARD B. FORSLUND,  
Appellee.

vs.

NORTHWESTERN ELECTRIC COMPANY,  
a corporation,  
Appellant.

APPEAL FROM JUDICIAL CIRCUIT  
OF CHICAGO.

221 I.A. 342

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

In this suit plaintiff sought to recover commissions on sales of machinery made by him on account of defendant. Upon trial he had a verdict and judgment was entered against defendant for \$14,508.23.

For three or four years there was a contract of employment between the parties and for a period prior to January 1, 1919, plaintiff received commissions of 10, 10 and 10 per cent. On that date plaintiff had a conversation with C. E. Martin, president of the defendant company, with reference to continuing the employment upon the same terms. What was said at this time is in dispute; Martin did not wish to pay the old rate of commission but offered 25 per cent instead. Plaintiff says that after considerable discussion Martin made the proposition that the defendant would give plaintiff 10, 10 and 10 per cent on rotary converters when used for motion picture work and 25 per cent on rotary converters when used for other purposes, on the net retail price, and that plaintiff agreed to this. Martin testified that plaintiff was dissatisfied with this and that it was not accepted. Plaintiff continued to sell goods as theretofore until July 1, 1918, when the contract of employment was terminated. This suit is for commissions on these sales at the rates above mentioned by plaintiff.





It is here urged by defendant that where one witness directly contradicts another on an issue of fact, it cannot be said that there is a preponderance of evidence for the plaintiff. This is true as a general rule, but in this, as in most other cases, there is other testimony and other circumstances which may properly lead the jury to accept the version of one witness rather than that of the other. Martin testified that plaintiff brought up "the three 10's on the moving picture business and we gave in to him on that," although "I objected first on giving more than 25 per cent." Martin claims that no agreement was made as to compensation, but the jury could fairly believe there was some agreement from the fact that plaintiff proceeded to place orders as he had done theretofore, which were filled by defendant. Defendant testified that in the spring of 1918 he informed plaintiff their business relations would terminate July 1st, which is inconsistent with the claim there was no agreement concerning the business. The jury had the opportunity to see the respective witnesses on the stand and to observe their manner of testifying. Considering all these circumstances and others which are suggested, we cannot say that the jury could not properly accept plaintiff's version of the contract.

There is no merit in the contention that the items making up the account were not sufficiently proven. In point of fact their correctness was not in issue, as the affidavit of defense did not deny or question the accuracy of the items of orders as set forth in plaintiff's statement of claim. Furthermore, the witness, Martin, testified that he did not question the amount of the bills except as to certain items; these were admitted by the plaintiff and their total, \$195.84, was remitted from the verdict. The account was properly established.



There was no reversible error in permitting the statement of claim with the account to go to the jury. Whatever may be the practice in the Circuit or Superior courts, it does not seem to be improper in the Municipal court when the correctness of the statement is admitted. Under such circumstances, we do not see how inspection by the jury could have harmed the defendant.

Under the issues in the case no reversible error was committed in the instructions given or refused.

No sufficient reason appearing for the reversal of the judgment, it is affirmed.

AFFIRMED.

Heldom, J. J., and Dever, J., concur.



WILLIAM B. MAKER,  
Appellant,

vs.

ELINE M. JENSEN, MARY  
VANGSGAARD and JAMES  
PETERSON,  
Appellees.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 42

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon an injunction bond signed by Eline M. Jensen and Mary Vangsgaard as principals, and James Peterson as surety. Upon trial by the court judgment was entered against plaintiff, from which he appeals.

There is no dispute on the facts. In February, 1913, plaintiff made a written lease to defendants, Jensen and Vangsgaard, of premises in Chicago for a period of five years. They used the premises for a moving picture theatre and later sold it to Walter Frather and Elmer J. Frather, who took possession and operated the theatre for a time, but subsequently abandoned it and brought suit in the Municipal court against Jensen and Vangsgaard to recover the money they had paid. Maker brought two suits in the Municipal court for rent against Jensen and Vangsgaard and had judgments for \$170 in each case. Executions were issued and given to the bailiff for collection. In February, 1915, while the executions were still in the hands of the bailiff and the suit of the Frathers was still pending, Jensen and Vangsgaard filed their bill in the Superior court seeking to enjoin Maker from collecting said judgments and also from instituting any suit against them under the lease, and also an injunction restraining the Frathers from prosecuting their suit in the Municipal court.





Injunctions were accordingly issued without notice, Jensen and Vangsgaard giving a bond with James Peterson, defendant here, as surety, in the penal sum of \$1,000.

Baker filed a cross bill to recover the balance of the rent due him under the lease. Upon final hearing a decree was entered dismissing the injunction bill as to Baker and ordering that any injunction restraining Baker from prosecuting suits for rent due under the lease up to the time of the filing of the bill of complaint should be dissolved. The decree also found that Jensen and Vangsgaard were indebted to him in the sum of \$2912.72, for rent due under the lease, in addition to the judgments previously recovered, and judgment was entered in his favor for that amount. It was also held that the equities in the injunction suit were with Jensen and Vangsgaard as to the brothers, and the injunction as to them was not dissolved.

At the time Baker recovered his two judgments Elsie E. Jensen, one of the defendants, owned real estate in Cook County worth at that time \$8,000, subject to an incumbrance of \$5,000; on April 1, 1916, while the injunction was still in force, she executed a trust deed conveying the premises to secure her note for \$500, and in October, 1916, while the injunction was still in force, she joined with her husband in conveying this property to her daughter, who, prior to the dissolution of the injunction as to Baker, conveyed the property to one James McCormick, subject to the two incumbrances referred to. Baker's executions upon his judgments in the Municipal court, after demand, were returned "no property found and no part satisfied," and upon the entry of the decree in the Superior court execution was issued against Jensen and Vangsgaard for the collection of \$2912.72, found to be due Baker, and this execution also, after demand, was returned unsatisfied. Jensen and Vangsgaard filed schedules with the bailiff of the



Municipal court, claiming they had no personal property subject to execution. Nothing on said judgments has been paid.

The injunction bond was conditioned that said Jensen and Vangsgaard should "well and true pay or cause to be paid to be paid to the said William J. Baker and Walter Brather and Elmer J. Brather, their heirs, executors, administrators or assigns, all such costs and damages as shall be awarded to any one or more of said defendants jointly or severally against said complainants in case the said injunction shall be dissolved."

The suit before us was brought by Baker on the bond and by his statement of claim he says that he is entitled to recover not only the amount of the two judgments which the injunction prevented him from collecting by levying upon the real estate of the defendant Jensen before it was sold, but also such additional sums for rent as fell due from time to time under the lease, for which he might have brought suit and levied executions but for the injunction. He also alleged the decree of the Superior court dissolving the injunction as to him, but making it permanent as to the Brathers.

Defendant Peterson, the surety, alone defended. Apparently the trial court was of the opinion that plaintiff could not maintain a several suit upon the bond, and judgment was rendered against him.

Counsel for plaintiff says that the decisive question involved in this record has never been before the courts in this state. This is probably true, but the Supreme court has spoken in two cases which give us fairly definite guidance as a conclusion as to what the law of this state is in this respect. The first of these is Ovington v. Smith, 78 Ill. 250, where the general rule was stated that where the interest of obligees in a bond is joint they must be joined as plaintiffs in an action on the bond. The





other case is The National Hotel Co. v. Flynn, 238 Ill. 436, in which the court held that where a bond was made to two or more persons jointly, the legal interest of such obligees is joint notwithstanding the defeasance clause which provides for the payment of money to one or more of the obligees jointly or severally, and that if all of the obligees are living at the time suit is brought on the bond they must join in the action.

It is insisted that the facts in the instant case differ materially from the facts presented in these cases; that the present record presents the question of one of three obligees in an indemnity bond pursuing an action thereon alone and alleging and proving that the other obligees have not been identified and that he alone has the beneficiary interest in the bond. While this precise record was not squarely presented in The Hotel Co. case, supra, yet in that opinion approval is given to considerations which, applied to the present question, lead to the conclusion that plaintiff cannot maintain this action alone. In the Hotel Co. case the distinction is noted between the legal interest of a party in the bond and the benefit to be derived from or under it; many cases are cited supporting this. "The fact that the defeasance in the bond provides for separate payments to the obligees does not change the legal interest in the obligation." Applying this to the instant case it is clear that by the terms of the bond the legal interests of the obligees were joint, although it may be that Baker alone had any beneficial interest from it. We further understand the Supreme court to be of the opinion that whether the legal interests of the obligees are joint or several must appear from the face of the bond alone in a suit thereon; and if it there appears without ambiguity to give the obligees joint legal interest, neither allegation nor proof as to the



beneficial interest can change the character of the legal interest. The court quotes with approval from Phillips et al. v. Singer Mfg. Co., 88 Ill. 305:

"Where a bond, upon its face, denotes the parties to it, the action must be between the parties to it, no matter what may be the terms of the defeasance."

And again from Barni v. Tenson, 1 Black. 309:

"The true rule, as stated by Baron Parke, is that 'a covenant may be construed to be joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction; but it will not be construed to be several by reason of several interests, if it be expressly joint.' In this case the covenant is joint and will admit of no construction. The condition annexed cannot affect the plain words of the obligation."

In vol. 15, American and English Ann. Cases, 1062, it is stated that:

"According to the weight of authority an action for the breach of the condition of a bond is not maintainable in the name of one obligee, although it is averred that the plaintiff alone has sustained damage."

This is supported by some citations, although it appears that in Tennessee a different rule prevails.

Defendant here makes two other points, namely, (1) the injunction was not dissolved, and (2) the statute provides the measure of damages when an injunction is dissolved. We do not think there is merit in these points. (1) A partial dissolution of an injunction constitutes a breach permitting a suit to recover damages for the wrongful issuing of the injunction. Walker v. Fritchard et al., 135 Ill., 103; Brackebush v. Bernetti et al., 136 Ill. 187. (2) Sec. 2, chapter 89, referred to, must be construed to mean that in a suit brought to enjoin the collection of a judgment, the sureties on the bond may be required to pay the amount of the judgment, interests and costs and also damages as assessed by the court, not exceeding ten per cent of the face of the judgment.

Holding as we do, that plaintiff cannot maintain his action alone, the judgment of the trial court was right and it is affirmed.

AFFIRMED.

Reldam, F.J., and Dever, J., concur.





FRANK NINBERG, a minor, by  
MAY BELLE SPENCER, his Guardian,  
Plaintiff in Error.

vs.

KRAUS BROS. LOEWY COMPANY,  
a Corporation,  
Defendant in Error.

WRIT TO SUPERIOR COURT  
OF COOK COUNTY.

221 I.A. 642

MR. JUSTICE McGRADY DELIVERED THE OPINION OF THE COURT.

Frank Ninberg, then about nine years of age, while in Fourteenth street, an east and west street in Chicago, was struck by a Ford runabout belonging to and operated by the defendant. By his guardian suit was brought to recover damages, and upon trial the jury returned a verdict for plaintiff but assessed the damages at one dollar.

Plaintiff here asserts that the injuries received were of so serious a character that the amount of one dollar awarded for damages is grossly inadequate and hence there must be a reversal. It may be conceded that this amount is not a proper compensation for the injuries, and were this the only point in the case plaintiff would be entitled to a new trial. Elmer v. Larrish, 144 Ill. App. 270. If upon the record it appears that plaintiff is not entitled to recover at all, we will not set aside a favorable verdict because the award is inadequate. O'Malley v. Chicago City Ry. Co., 35 Ill. App. 334; Lovett v. City of Chicago, 35 Ill. App. 670; Fritz v. Chicago Ry. Co., 205 Ill. App. 298; Kleinman v. C. & N. W. Ry. Co., 206 Ill. App. 343; 29 Cyc. 847. While there is some conflict in the testimony of the concurrence witnesses, the more probable and consistent story of the accident is told by the witnesses for the





defendant. Substantially their testimony is that the automobile was going west on Fourteenth street in the westbound car tracks at a speed of about ten miles an hour; that a number of small boys were playing in the street and as the automobile approached them it slowed down and the driver blew his horn, and all the boys, including Frank Linberg, ran to the north curb; that when he reached the north curb Linberg suddenly turned and ran towards the south side of the street immediately in the path of the automobile, which struck him and immediately stopped. This story is supported by the greater weight of the testimony, and under such circumstances there was a failure to prove the negligence charged against the defendant. The driver seems to have been proceeding carefully and with caution, and the accident was occasioned by the injured boy going suddenly from a place of safety into the place of danger.

Under such circumstances there was no liability of the defendant, but for the reasons above stated the judgment will be affirmed.

AFFIRMED.

Holden, F. J., and Mayer, J., concur.

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KATE SMITH,  
Appellee.

vs.

G. W. CRAMER,  
Appellant.

SUPREME COURT  
OF COOK COUNTY.

221 I A 642

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

In an action on the case for slander and for assault and battery plaintiff had a verdict of a jury and a judgment for \$500. Defendant appeals. Defendant conducts a bakery, of which plaintiff is a customer, and in July, 1917, when plaintiff was making some purchases of defendant there arose some question in defendant's mind as to the amount of change he had given plaintiff. Subsequently they had a conversation about this, in which defendant is said to have used certain slanderous words towards plaintiff and to have committed an assault and battery upon her.

Plaintiff's declaration consisted of seven counts, the first of which was dismissed. The second count charged that defendant had said to plaintiff, "You stole five dollars from me. You came into my store and got change for ten dollars and I gave you five dollars too much, and you knowing that walked out with my five dollars. If you don't pay me this by six o'clock this evening I'll have you in jail." The third count charged that defendant said, "You get out of my store. You walked out with thirteen dollars of my money. You are a thief." The fourth count charges that defendant said, "You stole five dollars of my money and unless you pay me by six o'clock this evening I will put you in jail." The fifth count charged that defendant said, "You swindled me out of five dollars. You are a thief. If you don't pay me back

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by six o'clock I will have you put in jail." The sixth and seventh counts charged assault and battery, namely, that defendant pushed, pulled, shoved and dragged plaintiff out of the store.

Plaintiff testified that defendant, in the presence of others, used words towards her which are somewhat like those above quoted. This is categorically denied by defendant. Plaintiff took with her on this occasion a friend, Mrs. Thielmann. There is some force in the suggestion that she was taken along by plaintiff to hear what was said and to support plaintiff's version. Mrs. Thielmann was apparently an honest witness, and we are inclined to give more credence to her statement of the matter than to that of the parties directly interested. Testifying on behalf of plaintiff, she says that in the conversation between them she did not hear defendant call plaintiff a thief or a swindler; that they were arguing about the amount of change defendant had given plaintiff at the time of the purchase above related; that what defendant said was, "If you don't pay me five dollars before six o'clock tonight, I will have you put in jail," at the same time putting his hand on plaintiff's shoulder and pushing her towards the open door.

Defendant, by proper motions, asked the court to instruct the jury to find him not guilty as to the slender counts, but these motions were denied. We are of the opinion that the motions should have been allowed and the instructions given, for the reason that the evidence did not support these counts. The counts charged defendant with threatening to put plaintiff in jail unless the money was paid back by six o'clock, coupled with the assertion that plaintiff had stolen the money or had swindled defendant out of it and that she was a thief. The utterance of these latter words failed of proof, and we are referred to no authority for holding that the mere threat to put a person in jail unless a claimed indebtedness was paid by a certain time was



slandarous.

Furthermore, the rule is that if the word "thief" be spoken of the plaintiff in relation to a past act, which was known to the hearers and which past act was not larceny nor indictable as a crime, the use of the word is not actionable. Ayers v. Grider, 18 Ill. 38; McGilvray v. Springett, 68 Ill. App. 278; Pollett v. Moore, 107 Ill. App. 479; Merrill v. Marshall, 113 Ill. App. 447. Applying this rule it is readily seen that whatever words were used by defendant in the dispute, they did not charge a crime. The controversy was only as to the amount of change owing to plaintiff in a small purchase. There is considerable argument as to the merits of the dispute, but this is immaterial in this case.

There is some testimony which might properly be submitted to the jury tending to support the counts charging assault and battery, as plaintiff and Mrs. Thielmann testified, substantially, that defendant pushed plaintiff through the doorway.

For the errors above indicated there must be a new trial, and if the same evidence should again be adduced, instructions should, upon action, be given to find the defendant not guilty as to the slender counts in the declaration. For the reasons above given the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Holmes, F. J., and Dever, J., concur.



291 - 26465

MADEIRA GUNWISS ADM,  
Appellee,

vs.

CHARLES STEIN,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

221 I.A. 642

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

January 25, 1919, plaintiff, while driving her automobile east on Forty-fourth street in Chicago, was struck by an automobile going south on Cottage Grove avenue, injuring her and damaging her automobile. She brought two suits for recovery, which were consolidated on the trial, and had a verdict for \$2487.58, from which defendant appeals.

No questions concerning negligence are raised here. The only point argued is that defendant did not own the automobile inflicting the injuries, but that it was owned by the Stein-Burns Camp and Field Equipment Company, of which he was president, and that the chauffeur driving the car at the time of the accident was employed by this company. It was shown that the offending automobile was a Cadillac limousine driven by Edward Beveridge, a chauffeur; that it had the initials "C. B. S." on the side; that <sup>in</sup> December, 1918, defendant made a contract with the proprietor of a garage on Forty-seventh street in Chicago for the keep of his car, which was a Cadillac, Berlin Body, four-door limousine; that the defendant had with him a chauffeur whom he introduced to the proprietor of the garage as Edward Beveridge, saying, "This is my chauffeur, his name is Ed Beveridge; he has charge of the car and he will be in with it;" that defendant gave his address and agreed to pay thirty dollars a month for the care and keep of the car; that defendant paid these bills for some months thereafter with his checks. The





garage keeper also testified that Beveridge drove the car from December to March, inclusive, and that he was the only chauffeur the defendant, Stein, had, and several times he saw Beveridge driving the defendant in the car. The only contradictory evidence is the statement of defendant that the car belonged to the company of which he was president, although he used it at times as did also his wife.

The question of ownership was a question of fact for the jury. Antis v. Hannan, 186 Ill. App. 360; Yace v. Brink's Chicago City Express Co., 192 Ill. App. 309; Roscoe v. Boston Store, 195 Ill. App. 133.

The testimony above referred to was sufficient for the jury properly to conclude that the ownership and control of the car at the time of the accident was in the defendant. Cases in which similar circumstances have been held sufficient to establish ownership are J. C. & St. L. Ry. Co. v. Gruenen, 69 Ill. 103; Schweinfurth v. Dwyer, 91 Ill. App. 318; Bruta v. Kourian, 241 Pa. State, 425; Lowson v. Wells Fargo & Co., 115 N. Y. Supplement, 647; Barry on Automobiles, page 683.

The record discloses no convincing reason to disagree with the verdict of the jury and the judgment is affirmed.

AFFIRMED.

Heldon, F. J., and Dever, J., concur.

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The second part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The third part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The fourth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The fifth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The sixth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The seventh part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The eighth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The ninth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The tenth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one.

337 - 26511

G. W. FARNEWORTH,  
Appellee.

vs.

MARY E. MEYERS and J. E.  
MEYERS,  
Appellants.

APPEAL FROM COUNTY COURT  
OF COOK COUNTY.

221 I.A. 643

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants by this appeal seek the reversal of a judgment against them of \$160 entered upon a verdict rendered in an action for damages for a breach of contract.

The declaration alleged that defendants leased to plaintiff a house at 1420 Maple avenue, Evanston, Illinois, for a term beginning September 15, 1919, and ending May 1, 1920, and plaintiff introduced evidence seeking to show that this contract of leasing was breached by defendants in that they leased the premises to other parties who were put in possession. The claim of damages was for various expenses incident to the necessity of finding another place to live.

Defendants say there was no contract of leasing between the parties, but only proposals for leasing upon which their minds never met. Inspection of the record shows this to be the fact. Plaintiff's counsel suggest that the bill of exceptions fails to present to us accurately the testimony of the jury heard before it. We must presume to the contrary and must confine ourselves in studying the testimony exclusively to what appears in the bill of exceptions. This rule is well established.

Defendants were real estate agents for the owner of 1420 Maple avenue and plaintiff interviewed them with reference to renting the house. The essential testimony of plaintiff is that he had a talk with Mrs. Meyers and afterwards with Mr. Meyers;





that plaintiff told Meyers he wanted a short lease and Meyers said this could be arranged if plaintiff bought of him; that afterwards in August, plaintiff says, Mr. Meyers suggested that he take the house at \$60 until January 1, but plaintiff told him he would take it at \$65, if he would put it in repair, until May 1; that thereupon Meyers made out written leases which plaintiff took home and upon examination found that they were made in the following September. Plaintiff thereupon made out two other leases for a short period and left them at Mr. Meyers' house with a check for \$65, plaintiff then leaving for Pittsburg. This check was made to the order of J. E. Meyers and was paid through the Chicago Clearing House, but Meyers returned to plaintiff the short leases, together with Meyers' check for \$65, with a letter stating in substance that this was not satisfactory and that the money and leases were returned. The letter also contained another offer of leasing and suggestions as to houses which defendants had for sale.

We are of the opinion this evidence of the plaintiff failed to prove any agreement between the parties as to a lease. It in fact shows a clear difference of opinion as to the term of the proposed lease.

Both defendants testified as to conversations with plaintiff. They say that plaintiff was never told he could have a lease for less than a year. Mrs. Meyers says she told him that the house must be leased for one year or longer. Meyers says when plaintiff left the short lease with his check, plaintiff told him that if he, Meyers, was not satisfied with that to return it and the matter would be dropped. There are other items of evidence which lead us to conclude that the minds of the parties did not meet in agreement and that there was no contract of leasing made by them. Upon the record before us the verdict was not justified, and the judgment thereon will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Holden, F. J., and Deyer, J., concur.



We find as a fact in this case that there was no contract between the plaintiff and defendants and no lease of the premises as described in plaintiff's declaration.



152 - 25923

CHARLES E. BARTLEY,  
Appellee,

vs.

EDWARD W. ANDREWS,  
Appellant.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

MR. PRESIDING JUSTICE ~~BARRETT~~

221 I.A. 643

DELIVERED THE OPINION OF THE COURT.

Appellee as lessor brought two suits against appellant as lessee, one for rent due for the months of May and June, 1916, and the other for rent due for the two following months, and obtained judgment in each case by confession. The judgments were opened up for defense under the general issue and the two suits consolidated. The evidence offered by defendant was rejected, and the jury were instructed to find for plaintiff in the sum of \$750, for which judgment was entered. The question presented is whether there was error in rejecting said offer.

Defendant offered to prove in substance that having lost his copy of the lease, he went to the office of the real estate firm that collected the rent and had possession of plaintiff's copy of the lease, and asked a representative of the firm what he was required to do to cancel the lease; that thereupon said representative brought the lease from the vault, and reading it said defendant would have to give written notice of his intention to cancel the lease on May 1, 1916, prior to February 1, 1916, and shortly afterward added "also would have to pay a bonus of \$50," but did not say when; that defendant said he would immediately give such notice, and that he would pay the bonus; that this was all that was said; that relying on said statements





defendant, on December 13, 1915, wrote to said firm that he wished to cancel and terminate the lease on April 30, 1916; that on December 15 said firm acknowledged the letter expressing regret to lose defendant as a tenant; that on March 6, 1916, defendant sent the firm another letter, enclosing his check to cover rent to March 30, 1916 and the bonus of \$50; that on March 8, 1916, the firm returned said check in a letter saying they were so instructed to do by the owner because by the terms of the lease the bonus must be paid at the time of giving notice to cancel; that shortly prior to March 15th defendant tendered a member of said firm \$50 to pay the bonus, which he declined to receive under instructions from plaintiff.

The lease was in writing and ran to April 30, 1917. The rent was paid up to May 1, 1916, when appellant (the lessee) vacated the premises. The real question at issue is whether appellant could terminate the lease without payment of said bonus on or before February 1, 1916, which calls for construction of the following provision in the lease:

"It is understood and agreed between the parties hereto that the party of the second part is to have the privilege of cancelling this lease May first, 1915, by giving the party of the first part or his agents written notice of his intentions to do so on or before February first, 1915, and at that time paying said first party a bonus of One Hundred Dollars (\$100.00), in consideration of said cancellation, and to have the same privilege of cancellation on May first, 1916, by giving said first party or his agents written notice of his intentions to do so on or before February first, 1916, and at that time paying said first party a bonus of Fifty Dollars (\$50.00)."

Appellant claims that the clause "at that time" in the last sentence refers to May 1, 1916, and not to February 1, 1916, and cites from dictionaries to the effect that the word "that" refers to things first mentioned, which undoubtedly is correct usage when the word is used in contradistinction to the word "this" in referring to different things before expressed. (See



definitions of these words given in law dictionaries by the different authors, Bouvier, Black and Anderson.) But such rule is not a decisive test where the word "that" is used alone and not in contradistinction to the word "this." We think it plain from the context of the provision in the lease above quoted that the two conditions of the right to terminate the lease on the first of May, namely, giving a notice and paying the bonus, were to be complied with before the previous February, and notice was of no avail without payment of the bonus. The object of such a timely notice was probably to give the landlord opportunity to secure another tenant, in case defendant was released. But defendant would not be released until he paid the bonus, and it is not a reasonable construction of the lease that the lessor would require a notice of three months and wait during that entire period without knowing whether the lease would be actually terminated. If he did not receive his bonus he could still enforce the terms of the lease against defendant notwithstanding the notice, and defendant might insist that not having paid the bonus and been released he had elected to retain possession. We think, therefore, that defendant by not paying the bonus before February 1, 1916, failed to comply with a condition necessary to terminate the lease.

Appellant urges that if the lease had required the payment of the bonus prior to May 1, 1916, that requirement was waived by the failure of said firm as appellee's agent to acquaint appellant with such requirement, and appellant was entitled to conclude from its possession of said lease that the firm was authorized to furnish the information appellant sought with respect to its terms. Appellant contends, therefore, that the proof offered would have presented questions of estoppel and waiver for submission to the jury.

There was nothing in the offer that tended to show a





general agency of said firm. The only authority conferred on the firm by the lease was to receive rent, service of a written notice of cancellation, and surrender of the keys. But the lease conferred no other special power and no general agency. The specific powers of agency referred to did not presumptively carry with them the power to cancel the lease. (Robinson v. Menaghan, 92 Ill. App., 620; Scanlan v. Herth, 151 id. 502.)

We think the court properly rejected the offered evidence as having no tendency to prove the exercise of the right to cancel the lease, and no waiver of its provisions by plaintiff or estoppel against him in enforcing its provisions. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

the following statement was not sufficient to justify a decision  
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The following statement was not sufficient to justify a decision

179 - 25951

ELIZABETH LIVINGSTON,  
Appellant,

vs.

BOSTON STORE OF CHICAGO,  
a corporation,  
Appellee.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE HARRIS  
DELIVERED THE OPINION OF THE COURT.

221 I.A. 643

Appellant brought an action of trespass for false imprisonment and assault. There was an instructed verdict and judgment for costs in favor of appellee. Some one had abandoned a child in appellee's department store, and one Miss Jones, appointed as a special police officer of the City of Chicago to serve at appellee's store among other places, while in said store in discharge of her official duties, accosted plaintiff and asked her if she was present when the abandonment took place, and to go with her to the manager of the store, who, meeting them on one of the floors, requested them to come to his office in the building, where he interrogated appellant as to her name, family, address and identity. There was nothing in the evidence tending to show that she did not voluntarily comply with these requests, or that she was under any restraint, or that any force was exercised to detain her. On the contrary, her own evidence tended to show that she made no objection to such requests but voluntarily complied therewith and freely answered the questions asked. There being no evidence tending to show false imprisonment or assault we think the verdict for



appellee was properly instructed. The mere fact, if it was fact, as testified to by plaintiff, that the officer tapped or took hold of her arm when the request for an interview was made was not sufficient of itself, unsupported by any other evidence of force or intention to use it, to constitute an assault or unlawful restraint..

However, even if the evidence showed a tendency to prove an assault or false imprisonment by said officer yet the evidence is undisputed that said officer was not in the employ of defendant, and, therefore, not being its servant or agent the doctrine of respondent superior is not applicable to this case. There was no evidence tending to show said officer was in any way subject to the orders or control of appellee's manager or appellee or that said manager or appellee undertook in any way to exercise any such control over said officer on the occasion in question. The authorities are so uniform on this subject that it seems unnecessary to cite them. We think, therefore, the court was justified in the absence of any tendency in the evidence to support the declaration to direct a verdict for plaintiff. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.





193 - 25965

LAURENCE QUINICI,  
Appellee.

vs.

TOWN OF CICERO,  
a municipal corporation,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

2211.A. 643

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit brought to recover damages for personal injuries received by appellee while riding as a guest in an auto-truck on one of appellant's streets. The evidence tends to show that the truck ran into a depression along a car rail in the street causing it to turn over and fall on plaintiff. The action is predicated on the failure of appellant to keep said street in a proper state of repair. The appeal is from a judgment entered in favor of plaintiff for \$4,500.

The first point is that the notice served upon appellant was insufficient in that it fails to state the time of the accident correctly, the place definitely, and the name of the attending physician. The notice designated the time as "about 6 o'clock p. m." of the date of the accident, the place as "48th Avenue near West 17th Street," and the name of the attending physician as "Dr. T. C. Hood," giving his address. The time as sworn to was as late as "along about between three and four o'clock in the afternoon," but the witness being unable to give the specific hour.

While West 17th street was not out through 48th avenue the curbing showed where they would intersect, and the evidence tended to show that the accident took place near that point. It also tended to show that the first physician attending



The first part of the paper is devoted to a description of the apparatus used in the experiments. The apparatus consists of a large tank of water, in which a small tank of oil is placed. The oil tank is connected to a pump, which is driven by a motor. The pump is used to draw oil from the tank and to pump it into a small tube, which is then connected to a large tube. The large tube is used to draw water from the tank and to pump it into a small tube, which is then connected to a large tube. The large tube is used to draw water from the tank and to pump it into a small tube, which is then connected to a large tube.

The second part of the paper is devoted to a description of the results of the experiments. The results show that the rate of flow of oil through the small tube is proportional to the square root of the pressure difference between the two ends of the tube. This result is in agreement with the theoretical prediction of Poiseuille's law.

The third part of the paper is devoted to a discussion of the results of the experiments. The results show that the rate of flow of oil through the small tube is proportional to the square root of the pressure difference between the two ends of the tube. This result is in agreement with the theoretical prediction of Poiseuille's law.

The fourth part of the paper is devoted to a conclusion. The results of the experiments show that the rate of flow of oil through the small tube is proportional to the square root of the pressure difference between the two ends of the tube. This result is in agreement with the theoretical prediction of Poiseuille's law.

plaintiff after the accident was a Dr. Head and his residence, and that the then attorney for defendant - who also conducted the defense - rode with appellee from the office of Dr. Head, where appellee received first aid, to the hospital where he was taken and later cared for by other physicians. It further appeared that appellant's engineer and two of its police officers were at the scene of the accident within an hour of its happening, and that the engineer took measurements of the hole into which the evidence tends to show the truck ran. There was no attempt to show that appellant was misled or prejudiced by any misrepresentation or indefiniteness in the notice. On the contrary, knowledge of the time and place, and of the first attending physician came to its agents acting in the premises within the very hour of the accident and the facts were investigated, in part at least, even before said notice was served. We think there is no just ground for complaint as to the sufficiency of the notice under such circumstances. It appears that Dr. Head did not testify and that doctors who later attended appellee in the hospital did. But that has no bearing, in our judgment, upon the sufficiency of the notice. No complaint is made that appellant did not know or could not ascertain who those physicians were and what they knew of the case, as well as all the other circumstances attending the accident.

The admission of photographs purporting to be those of the place of the accident is complained of. The claim is that the evidence did not show who took them, nor the competency of the photographer, nor the place where or time when they were taken, nor that they were taken under conditions like those existing at the time of the accident. There was evidence that the photographs were correct pictures of the place of the accident at or about the time it happened. One of appellant's policemen, looking at the





photograph, said, "that is the way it looked there. They were correct pictures of the street at that point." Two other witnesses testified to substantially the same thing. This was sufficient to warrant the admission of the photographs.

Appellant claims that the evidence shows that the accident was the result of the negligent and fast driving of the truck and not necessarily the condition of the street, and therefore its negligence, if any, was not the proximate cause of the accident. The evidence was so conflicting on this point as to make the question one particularly for a jury, and we cannot say that the verdict was against the preponderance of the evidence.

It is also urged that because the proof shows plaintiff was "riding" and not "driving," as alleged in the declaration, on the street in question, there was a variance between the proofs and the declaration. We do not find that this point was raised at the trial, and hence is not open to consideration here even if such a variance would be deemed fatal.

Certain given instructions are complained of as error without designating in what particulars. We have, however, examined them and do not think they constitute reversible error. Finding no reversible error we affirm the judgment.

AFFIRMED.

Gridley and Matchett, JJ., concur.



211 - 25983

IMRR KONCKOL, sometimes  
called Emrick Kensal,  
Appellee.

vs.

CHICAGO RAILWAYS COMPANY  
et al.,  
Appellants.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

221 I.A. 644

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of \$1250.00 for personal injuries received by appellee (the plaintiff) from a collision with one of appellants' street cars.

Appellants contend that the verdict is against the clear preponderance of the evidence in that it shows that the car was propelled at moderate speed while approaching 94th street, Chicago, where the accident took place, with the exercise of ordinary care by the motorman to avoid danger, and that plaintiff was guilty of contributory negligence. On both points the evidence, as is not unusual in such cases, was conflicting. There was evidence from which a jury might have decided the case either way. But the evidence is so unsatisfactory on what we deem the main point in controversy that while we feel the judgment should not stand we also think that the plaintiff was wrongfully prevented from putting in full evidence on that point and hence the cause should be remanded for a new trial.

The accident happened on November 10, 1916, at about 7 p. m. in an open country where 94th street, a dirt road running east and west, crosses the westerly or south bound track on which appellants' car was running. Plaintiff was going west, and the car struck the rear end of his wagon,



throwing it on its side and plaintiff and the horse to the ground. The evidence indicates that each vehicle was so lighted as to be visible to one driving the other as each approached the crossing; that plaintiff could have seen to the north where the car turned from 93rd street to go to 94th street - a distance of about 700 feet - and that the motorman should have been able to see the light on the wagon for a distance of at least from 200 to 250 feet; that plaintiff did not actually see the car until he had about reached its track, when he thought it was about half a block away, but when it was probably less, for he then hurried his horse into a trot but was unable to clear the track and avoid the collision. While evidence as to the speed of the car, which ranged from 8 to 30 miles an hour as the car approached the wagon, though probably well within these extremes, had a bearing on the principal question of whether the motorman had his car under proper control at the time and place, as unquestionably was his duty, yet as we view the evidence the real question for the jury to determine was, so far as the charge of negligence was concerned, whether the motorman should not have seen the car, whatever its speed, in time to have averted an accident at that place and therefore before the time when he actually put on the brakes.

One of plaintiff's witnesses had testified to the fact that when standing in the front vestibule of the car near the motorman he saw the wagon and the motorman was looking elsewhere and permitting the car to maintain a high rate of speed up to the time when without avail he put on the brakes. But the testimony of this witness was very unsatisfactory and rendered still more so by the rulings of the court. In one



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view of his evidence, which the jury may have taken, the motor-man would have seen the horse and wagon near or at the crossing in ample time to have avoided the collision had he not been looking in a different direction. But on cross examination he was led to say that at that time the car was 250 feet from the crossing and the wagon 400 feet east thereof - an improbable state of facts from every view of the case. This witness evinced great confusion, if not obtuseness, in the course of his examination, as is illustrated by the fact that the effort to obtain from him his understanding of the direction the car was going when it turned from 93rd street to 94th street took three pages of the stenographer's transcript. He made various contradictory statements as to directions, indicating either that he did not know them, or that he was so confused or obtuse that he did not understand the questions, which were not always sufficiently clear, and were so freely interspersed with numerous technical objections and comments of counsel that it is not surprising that some confusion resulted. When, however, plaintiff's counsel, who had not previously examined the witness on the point of the distance of the wagon from the crossing when he first observed its light, undertook on redirect examination to question the witness with respect thereto - it being apparent that he could not mean what he had said - he was precluded by the court from doing so. Plaintiff's counsel persisted, over defendants' objections, upon his right to pursue such examination, but to no avail. Had the court permitted such examination some of the incongruities of his testimony might have disappeared. The testimony of this witness was important, if not necessary, to plaintiff's case. But while its incongruities are such that we do not think the jury was fully warranted in accepting the interpretation put upon his testimony in appellee's argument, and that therefore the judgment

...of his evidence, which the jury may have taken, the witness  
...could have seen the horse and wagon very early in the morning  
...in which case he must have seen the collision had he not been look-  
ing in a different direction. But on cross-examination he was  
asked to say that at that time the car was still back from the cross-  
ing and the wagon had not yet started - an impossible state of  
affairs from every view of the case. This witness refused to give  
evidence, it was obvious, in the course of his examination,  
he is eliminated by the fact that the effort to obtain from  
him the testimony of the direction the car was going when it  
crossed the road about 10 feet ahead of the wagon at the  
intersection is frustrated. He made various contradictory state-  
ments as to direction, indicating either that he did not know  
them, or that he was so confused or nervous that he did not under-  
stand his position, with such other statements that  
he was so badly frightened that he could not give reliable  
evidence of anything that it is not surprising that some con-  
fusion resulted. When, however, Kishel's counsel, who had not  
previously examined the witness on the subject of the direction of  
the wagon from the crossing when he first observed the light,  
insisted on further examination in relation to this point, the  
witness broke - it being apparent that he could not stand such  
an examination - he was excluded by the court from being an ad-  
versely examined witness, and the testimony of Kishel was  
admitted to prove such a collision, but in no way. And this is what  
remained upon examination and of the investigation of the  
testimony of the witness. The testimony of this witness  
was, however, is not necessary, he admitted, and which  
the court admitted was not necessary as it was clear that he  
fully intended to examine the witness and that he

cannot stand, yet we also think that by reason of the court's improper rulings upon defendants' objections, this witness was prevented from fully elucidating the testimony he had given on cross examination, and therefore it would be unjust to appellee in this state of the record to enter a judgment here finding the facts adversely to him.

Accordingly we think the judgment should be reversed and the cause remanded for a new trial, and that will be the order of this court.

REVERSED AND REMANDED.

Gridley and Watchett, JJ., concur.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom relating to the treatment of the British Commonwealth countries.

and the same situation can be found in the  
case of the other two cases.

• • • • •



214 - 25986

CHICAGO BARGAIN HOUSE,  
a corporation,

Appellee.

vs.

MAX HUDNICK,

Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 644

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

This record contains no bill of exceptions. Hence assignments of error relating to evidence and other matters not preserved by a bill of exceptions, including motions for a new trial and in arrest of judgment (People v. Cowen, 233 Ill. 308; Commissioners, etc. v. Carroll, 295 id. 482) cannot be considered by us; and, too, as the trial was without a jury the motion for a new trial, if preserved, would present no question for review. (Climax Tag Co. v. American Tag Co., 234 id. 179.)

But the point raised by appellant whether the statement of claim is sufficient to support the judgment, can be reviewed without a bill of exceptions (Lloyd v. Sandusky, 223 Ill. 621; Grand Pacific Hotel Co. v. Pinkerton, 217 id. 61, 76) under the assignment of error that the judgment is contrary to law.

The first statement was stricken on motion, apparently because it did not state a consideration for the agreement sued on. In its amended statement of claim plaintiff attempted to state a consideration but manifestly failed.

The statement of claim, as amended, is predicated on the claim of an alleged contract of employment whereby defendant



was to purchase for plaintiff and the Standard Motor Car Company certain fixtures at an auction sale, and that he purchased at such sale 361 feet of partition fixtures at \$1.05 a foot; that he thereafter delivered to plaintiff 30 feet thereof, and to the Standard Motor Car Company also 30 feet, for which they "allowed" him \$60, and that he refused to deliver to them any more of said fixtures; that the market value of the same was \$412; that the Standard Motor Car Company has assigned to plaintiff all its rights and interests in the transaction, and plaintiff asks that after allowing defendant said \$60, and \$379.95 advanced by him in payment of the fixtures, plaintiff be allowed a judgment for \$1972.95. A judgment for \$1646.94 was given.

In the amended statement of claim the alleged consideration is stated as follows:

"That said employment was in consideration of the foregoing arrangements concerning said engine, and also in consideration of the plaintiff and said Standard Motor Car Company agreeing with defendant to repay to him promptly, whatever moneys he should advance for the purchase of the property which he might purchase at said auction sale; and plaintiff also expected to pay the defendant some fair compensation for his services."

The "foregoing arrangements concerning said engine" thus referred to, as previously stated in the pleadings, were that prior to said auction sale "defendant had purchased of plaintiff an engine located in a place of business occupied by plaintiff as lessee, and the plaintiff at defendant's request had allowed said engine to remain where it was in said place storage free." There is nothing in such "foregoing arrangements" that constituted consideration for the transaction in question. They were a mere gratuitous bailment, presumably - from the statement - a part of another completed transaction.

The second part of the alleged consideration is that defendant was to be repaid "promptly" whatever moneys he should





advance in the purchase of the property; in other words, paid back his own money. But the statement of claim does not allege that such money has been repaid or even tendered. On the contrary, it expresses plaintiff's willingness merely to allow less than defendant had paid for such part of the goods as he seemed willing to let plaintiff and its associate have. Neither of these allegations states a consideration moving to the defendant or any benefit conferred upon him. Even if he agreed to purchase the property for plaintiff we see nothing, in the absence of any consideration to support an agreement so to do, to prevent defendant, having used his own money, to claim title to the goods. If they were his there was no conversion of them, and, therefore, no basis for the action.

With respect to the alleged consideration that plaintiff "expected to pay the defendant some fair compensation for his services," it is enough to say that is quite different from a promise or agreement to pay him for his services.

As the statement of claim, in the attempt to set forth a consideration for the alleged contract, indicates that there was no consideration therefor, construing it most strictly against the pleader, it does not set forth a legal cause of action and, therefore, the judgment must be reversed.

REVERSED.

Gridley and Hatchett, JJ., concur.



1848

226 - 25998

JENNIE MARMER,

Appellee.

vs.

THE METROPOLITAN WEST SIDE  
ELEVATED RAILWAY COMPANY,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 644

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This action is predicated on the charge that defendant so negligently operated an electric car in which plaintiff (appellee) was a passenger that it "gave a sudden and violent jerk" causing her to be thrown to the floor of the car and injured.

That plaintiff fell in the car was not questioned. The vital question of fact for the jury to determine was whether, if her fall was caused by a jerk of the car at all, the jerk was unusual. On this point we think the verdict is manifestly against the preponderance of the evidence, and will briefly state our reasons.

It is undisputed that the train consisted of two cars, a motorcar and a trailer or "smoker" behind it; that the motorman was in the front vestibule of the former and the conductor at his station between the two cars, standing with one foot on the open platform of the smoker, and the other in the passage leading to the motorcar, where he operated the gates to let passengers on and off, and that those in the motor-car had to leave at its rear end and could not get off from its front end. Plaintiff's only witness to the occurrence, beside herself, said he was not in the first car nor in the



smoker, but admitted that no one could get off at the front end of the first car. She testified that she was in the first car and fell down "near the front door where you have to get off," and that the conductor also was standing at the front door - an impossible place for him to perform his duty at the gates. In view of the great preponderance of evidence establishing the fact that plaintiff was in the first car and preparing to get off the same at its only exit, namely, in the rear, the version given by plaintiff and her witness was manifestly incorrect. While her recollections may have been confused by reason of the accident it is difficult to account for his evidence, if he was actually there. The fact that he agreed with plaintiff in a manifestly erroneous version impairs the probative value of his testimony, especially as it appears that his name was not taken as a witness, that he knew no one in the car at the time, that he never saw plaintiff until within three months of the trial - fifteen months after the occurrence - and then met her through the solicitation of her husband who claimed to have learned of his presence in the car at that late day but in a way unsatisfactorily explained. His testimony, on which plaintiff was wholly dependent for corroboration, cannot be deemed very reliable under such circumstances, especially when contradicted by that of three other disinterested witnesses and the testimony of the conductor and motorman, all of whose versions conform to the physical facts of the case.

The three passengers thus testifying gave their names and addresses at the time and some of them written statements of the facts shortly afterwards. Two of them stood in the rear end of the first car near where plaintiff fell, and one stood on the open front platform of the smoker. Each saw her fall, gave a similar description of the manner of it, and were positive that





there was no jerking of the car or unusual movement of the train. Even plaintiff's witness on cross examination said that he observed nothing unusual about the motion of the car until he heard her "holler" at the time of her falling, which, of course, was after the time of the alleged jerk.

In describing her fall the three passengers testifying for defendant said in turn that "her knees gave way and she fell backwards putting her hand down to get support;" that "she seemed to drop down;" that "plaintiff kind of stooped down and then went to the side to the floor;" that "she stooped as she fell," sitting down on her knees and going over to her left side. It appeared that plaintiff had an exophthalmic goiter, one of the symptoms of which is a tendency to weakness of the knees and of the muscles which become flaccid. These witnesses' description of her falling seems to have been consistent with such symptoms.

The motorman also testified that the equipment of the car was such that in applying and shutting off the electric power no jerking would occur. But we find nothing in the evidence to indicate any unusual jerk or movement of the car, neglect or want of care in its operation. If the movement had been unusual it is strange all the other numerous passengers standing in the car preparatory to getting off should not have fallen or so staggered as to make it noticeable to more than one passenger in the car.

Authorities upon actionable negligence from the jerking of an electric car are to the effect that it being an incident to the method of transportation, the jerking or lurching or stopping of the car must be unusual to justify the inference of negligence or carelessness in its operation, and that it is not enough to prove a mere "jerk" and an injury therefrom, or to characterize it as "violent" or "sudden" or by a similar term; but that there must be proof of such attendant circumstances as support and



decisions of this court, (C. & A. M. R. Co. v. Means, 48 Ill. App., 396; Ch. Un. Tr. Co. v. Duckstein, 136 id., 399) and are observed generally in other jurisdictions. Bollinger v. Inter-urban St. Ry. Co., 98 N.Y.S., 641; So. Ry. Co. v. Norwood, 186 Ala., 49; Ewing v. Wichita Rd. & Light Co., 91 Kan. 388; Dawson v. Md. Elec. Rys. Co., 119 Md. 373; So. Cov. & Cin. St. Ry. Co., v. Trowbridge, 163 Ky. 79; Work v. Bos. El. Ry. Co., 207 Mass., 447; Ottinger v. Detroit United Ry., 166 Mich. 106; Babbitt v. United Rys. Co. of St. Louis, 169 Mo. App., 424; Connor v. Wash. Ry. & E. Co., 43 App. D. C., 329.

We shall not attempt to review the authorities.

It is enough to refer to them for support of the doctrine, the gist of which is that the proof must be such as to indicate that the jerk, lurching, or swaying of the car was unusual. Such is not the proof in this case. The judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley and Matchett, JJ., concur.



226 - 25998

FINDING OF FACT.

We find that appellee, The Metropolitan West Side Elevated Railway Company, did not carelessly or negligently run, manage, operate, conduct or control the car in question and that appellee's injuries were not caused by any unusual jerk or movement of said car.





192 - 25964

AMBROSE F. NEDE, Appellee,

vs.

TOWN OF CICERO, a  
municipal corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 644

MR. JUSTICE ORIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit commenced in the Superior Court of Cook County on November 15, 1918, by Ambrose F. Nede for the recovery of salary claimed to be due him as fire marshal of the Town of Cicero, in Cook County, Illinois, from May 1, 1918 to August 20, 1918. Plaintiff's declaration consisted of the common counts, to which was attached a copy of a resolution, claimed to have been adopted on September 5, 1918, by the board of trustees of said Town of Cicero, "that the president and town clerk be and they are hereby directed to issue warrants on the town treasury from the several funds, and that the treasurer be and he is hereby directed to pay the same for the following amounts, as salaries due the following persons: \* \* \* A. F. Nede, from May 1 to August 20, 1918, \$583.33, \* \* ." The defendant filed a plea of the general issue, accompanied by an affidavit of defense, made by its town clerk, setting up in substance as defenses (a) that between the dates above mentioned plaintiff was not employed in any office or position by said Town of Cicero, (b) that between said dates plaintiff did not render any services to or for said Town, (c) that prior to May 1, 1918, plaintiff was removed from the office of fire marshal by the president of the board of trustees of said Town, (d) that during the period



for which plaintiff seeks to recover salary the duties of the office of fire marshal were performed by one George Warthels to whom the salary appropriated for said office or position was paid, and (c) that plaintiff never was an officer de jure of said Town. By agreement the cause was tried before the court without a jury, resulting in a finding of the issues in favor of plaintiff and assessing his damages at the sum of \$559.70, upon which finding judgment for said sum was entered on October 21, 1919 against defendant and this appeal followed. The question is raised as to the amount of the finding and judgment.

Plaintiff's evidence consisted of his own testimony and that of several other witnesses and certain documentary evidence. At the close of plaintiff's case the attorney for defendant moved for a finding in its favor, but the motion was denied. No evidence was offered on behalf of defendant.

It appears from plaintiff's evidence in substance that at a regular meeting of the board of trustees of the Town of Cicero, held on April 25, 1911, plaintiff, by unanimous vote of the trustees present, was appointed fire marshal for the Town, the appointment to take effect on May 1, 1911; that he entered upon his duties and continued to act as and perform the duties of the position until May 1, 1919; that during all of this period he received his regular salary from the Town, excepting from May 1, 1918 to August 30, 1918; that his salary for the month of April 1918 was \$160; that he did not receive any pay for 19 days in August 1918, but received 12 days pay for that month on the basis of \$175 a month; that on April 9, 1917, a code of ordinances was duly adopted; that by section 841 of said code it is provided that the fire department of said town shall consist of a fire marshal and such number of assistants, engineers,





pipemen, truckmen, and other firemen as the town board may from time to time direct; that by section 842 of said code it is provided that "all members of the fire department shall be appointed by the board of trustees, \* \* "; that at a meeting of the board of trustees of said Town held on April 23, 1918, the then president of said Town presented a communication to said board to the effect that he had discharged certain named persons, including plaintiff as fire marshal, from their respective offices or employments, and had declared said offices vacant; that this action of the president was not acquiesced in by a majority of the seven members of the board of trustees; that following the meeting three of the members called on plaintiff and told him the president had attempted to discharge him from his position as fire marshal, that the board had not agreed to his discharge, and that he should continue in his position and perform his duties; that on the following day a fourth member of said board called upon plaintiff and told him that a majority of the board did not believe that the president had authority to remove him from his position and advised him to stay on the job and continue to perform his duties; that on or about May 1, 1918, plaintiff received a letter purporting to be signed by the then president of the town board as follows: "By virtue of the power and authority vested in me as president of the Town of Cicero, you are hereby removed from the office of fire marshal of the town of Cicero, -- this removal to take effect at once"; that following the receipt of said letter plaintiff, acting upon the instructions given him by the four members of the board as aforesaid, continued to act as fire marshal and to perform the duties of the position during said period ending August 20, 1918, on which date he received another letter from the then president of said Town to the effect that said president had appointed him



fire marshal, - the appointment to become effective at once; that during said period from May 1, 1918 to August 20, 1918, he performed the usual duties of fire marshal, attended fires, directed the movements of firemen, issued instructions to his assistants and ordered supplies, etc.; that on September 9, 1918, at a regular meeting of the board of trustees of said Town, said trustees by a vote of four to three duly adopted the resolution first above mentioned, whereby the president of the board and the town clerk were directed to issue warrants on the town treasury from the several funds and the treasurer was directed to pay certain salaries to various persons, including the salary of plaintiff for said period from May 1, 1918 to August 20, 1918, but that such warrant was never issued regarding plaintiff's salary for said period and that he never received said salary.

Various points are here made and argued by counsel for the defendant as grounds for a reversal of the judgment. We have considered them as well as the several mandamus cases cited. No useful purpose will be served by a discussion of the points, or of the cases which we deem inapplicable to the facts disclosed in the present record. Suffice it to say that in our opinion the finding and judgment of the trial court were right. Plaintiff commenced to act as fire marshal for the Town in May, 1911, having been duly appointed to that position by the board of trustees, and continued to perform the duties of his office and receive salary for his services for a period of seven years, up to May 1, 1918. About this time the president of the Town attempted to remove from his position, against the wishes of a majority of the board of trustees, by which body he had been appointed. The individuals composing said majority of the board directed him to stay in his position and he did so during the period in question, from May 1, 1918 to August 20, 1918, continuing to perform his duties as fire marshal. It does not





appear that any other person during said period received any salary as fire marshal. On August 20, 1918, it appears that for some reason not disclosed, the president of the Town (the same individual who as president had attempted to remove him from his position) was willing that plaintiff thereafter act as fire marshal, and plaintiff continued so to act until May 1, 1919, receiving his salary from August 20, 1918 to May 1, 1919. But plaintiff did not receive his salary for the period between May 1, 1918 and August 20, 1918, and on September 5, 1918, the board of trustees at a regular meeting passed the resolution above mentioned providing for the payment of plaintiff's salary for said period, but said salary was not thereafter paid to him and he brought this action. We think that under the peculiar facts shown he was entitled to recover in this form of action.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.





305 - 38977

SIMON HORVITZ and ALBERT  
HORVITZ, trading as  
Horvitz Brothers,

Appellants,

vs.

S. SEGARI & COMPANY,  
a corporation,

Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 644

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant in contract in the Municipal Court of Chicago to recover damages for defendant's refusal to accept upon arrival in a car at New Orleans, Louisiana, 24,000 pounds of red onions sold to it at \$5 per cwt. Defendant promptly notified plaintiffs of the non-acceptance of the onions, and plaintiffs thereafter sold them at New Orleans and charged defendant with the difference between the contract price and the sum realized at the sale. It was stipulated on the trial that this difference amounted to \$697.79. Defendant's defense, as stated in its affidavit of merits, was that it was not indebted to plaintiffs in any sum; that it agreed to purchase of plaintiffs a car of fancy red onions; and that the onions shipped in the car "were not fancy red onions, but were onions in bad condition, a large proportion of the same being heavily sprouted, while others were soft, mushy or leaking following injury due to freezing." It was also stipulated on the trial that the contract between the parties was made on March 7, 1919, by telegram between a broker in New Orleans, acting for defendant, and plaintiffs, whereby defendant ordered, and plaintiffs agreed to ship to defendant at New Orleans, a car of fancy red onions at \$5 per cwt., f.o.b. Knox, Indiana; that on March 8, 1919, plaintiffs shipped 240 one hundred pound sacks of onions in one car from Knox, Indiana,



to defendant at New Orleans; that the car arrived in New Orleans on March 15, 1919; that the onions were on the same day inspected by defendant and refused by it and plaintiffs notified; and that the onions were thereafter sold by plaintiffs' broker, W. F. Stich, in the open market in New Orleans, as soon as possible and for the best price obtainable. The cause was tried before the court without a jury, resulting in a finding of the issues against the plaintiffs and the entry of a judgment against the plaintiffs for costs, which judgment it is sought by this appeal to reverse.

The main contention of counsel for plaintiffs is that the finding and judgment are against the manifest weight of the evidence. Three witnesses for plaintiffs testified. They were the two members of plaintiffs' Chicago firm (which sold cabbages and onions in large quantities all over the United States and Canada and had a storage plant at Knox, Indiana) who were at said plant and inspected the onions about the time they were shipped, and one Munnicutt, an employe of plaintiffs in charge of said plant. Their testimony was to the effect that the onions were run over a screen and inspected before being resacked and shipped, and all bad ones picked out, and that the onions as finally loaded in the car and shipped were "fancy" onions, in first class condition, free from frost, and having no sprouts. It appears that a "fancy" onion is the highest market grade. Simon Horvitz further testified that "a fancy onion is one of good color, good size and free from sprouts and frost; if an onion has been frozen as soon as it shows out it will show it and will not be a fancy onion." Two witnesses testified in open court on behalf of defendant, viz.: Lyman H. Megari, an officer of defendant, and C. J. Hansen, a buyer for a Chicago firm and who for several years had been engaged in inspecting perishable commodities including onions. Portions of the depositions, taken in New Orleans, of two other witnesses for





defendant were read in evidence, viz: W. F. Stich, plaintiffs' New Orleans broker who finally there sold the onions in the open market, and F. H. Lister, an inspector of fruit and produce for the U. S. Government. Degari testified, in substance, that he inspected some of the onions in different parts of the car immediately upon their arrival in New Orleans; that he cut slits in the side of ten or twelve sacks and examined the onions therein contained; that he "found sacks running from 5 to 15 per cent sprouted, 5 to 10 per cent soft, leaky, mushy onions, and another 10 or 15 per cent just about getting to the soft stage"; that on the following day, after the contents of about 30 bags of the 240 bags shipped, taken from different parts of the car, had been dumped upon a platform, he made a second inspection; that this second inspection showed the entire car to contain onions "from 6 to 10 per cent soft, leaky and mushy, and from 5 to 15 per cent sprouted as much as 5 or 6 inches," and that some of the onions were frozen uniformly through all the sacks; that, considering the admitted minimum temperature encountered during the transit in a refrigerator car of 26 degrees above zero, and the maximum temperature encountered at 68 degrees, he was of the opinion that said onions were not frozen during transit; that the onions in said car were not fancy onions when they arrived in New Orleans; and that in his opinion they could not have been such when shipped from Knox, Indiana, on March 8, 1919. Stich, plaintiffs' broker, testified in substance that he examined the onions on the platform of a railroad shed on March 19, 1919; that they showed decay, and were heavily sprouted and generally damaged; and that in his opinion they could not have been fancy onions when shipped from Knox, Indiana. The testimony of Lister, the government inspector and who inspected the onions on March 18th, was to the same effect. We think that the finding and judgment were amply sustained by



the evidence.

It is also contended that the trial court erred in admitting testimony as to the condition of the onions upon their arrival in New Orleans. The argument is in substance that, inasmuch as the contract called for delivery in a car f. o. b. Knox, Indiana, the onions became the property of defendant when they were there delivered to the carrier, that they were shown by plaintiffs' witnesses to be then "fancy" onions, and that, therefore, it was immaterial what their condition was when they arrived at New Orleans. We do not think that the court erred in admitting this testimony. The delivery of the onions to the carrier at Knox Indiana, passed title to the defendant only in case they were of the grade defendant had agreed to purchase. Under the circumstances shown defendant had no opportunity to inspect the onions until after their arrival at New Orleans. It was not obliged to accept other than "fancy" onions and we think that the condition of the onions upon arrival at New Orleans was a material fact. (Childs v. Reibe, 9 Ill. App. 598, 602; Forbes v. Fausinsky, 14 Ill. App. 17, 21; Imbrie v. Wetherbes & Co., 70 Mich. 103, 104.)

And we do not think that under the facts and circumstances disclosed any prejudicial error was committed by the trial court in permitting some of defendant's witnesses to answer certain hypothetical questions complained of by counsel. (James v. Johnson, 12 Ill. App. 286, 289.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

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case of the other two, and it is a question of degree

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208 - 25980

JOHN EVANS CORWELL,  
Appellee,

vs.

CARL G. BINGHAM,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 645

MR. JUSTICE SHIDLEY DELIVERED THE OPINION OF THE COURT.

Two separate actions of the fourth class were commenced in the Municipal Court of Chicago by plaintiff to recover of defendant certain installments of rent claimed to be due and unpaid under a written lease executed by the parties on March 4, 1916, wherein plaintiff leased to defendant a dwelling house, known as 1365 Hyde Park boulevard, Chicago, for the term of four years, from May 1, 1916 to April 30, 1920, at a rental of \$75 per month. Defendant took possession but during September, 1918, abandoned the premises. The period for which plaintiff sought to recover rent was seven months, viz., from October 1, 1918 to April 30, 1919, during which time the premises remained vacant. Plaintiff procured another tenant on May 1, 1919. By agreement the two actions were consolidated and were tried before the court without a jury resulting in a finding of the issues against defendant and assessing plaintiff's damages at the sum of \$525. Judgment was entered on the finding against defendant in said sum and this appeal followed.

Concurrently with the execution of the lease plaintiff agreed in writing to make certain enumerated repairs on the premises, most of which he made prior to the date defendant took possession. Among other repairs he agreed (1) to see that the plumbing system was in good order, (2) to install a toilet in the basement, and (3) to build a walk across the grass from





Figure 1. The relationship between price and quantity.

The relationship between price and quantity is a fundamental concept in economics. It is represented by a graph with price on the vertical axis and quantity on the horizontal axis. The graph shows a downward-sloping demand curve and an upward-sloping supply curve. The intersection of these two curves is the equilibrium point, where the quantity demanded equals the quantity supplied. The area under the demand curve and above the equilibrium price is called consumer surplus. The area under the supply curve and below the equilibrium price is called producer surplus. The total area under the demand curve and above the supply curve is called total surplus. This graph illustrates the economic benefits of trade and the importance of the equilibrium price.

The graph shows the relationship between price and quantity. The vertical axis represents price, and the horizontal axis represents quantity. The downward-sloping line represents the demand curve, and the upward-sloping curve represents the supply curve. The intersection of these two curves is the equilibrium point. The area under the demand curve and above the equilibrium price is the consumer surplus. The area under the supply curve and below the equilibrium price is the producer surplus. The total area under the demand curve and above the supply curve is the total surplus.

the sidewalk to the street. The lease contained the provision: "Permission given to erect a portable garage in the rear yard and extending partly into open space behind the yard;" and also the further provision that the lessee "has received the premises in good order and repair, except as hereon otherwise specified \* \* ; and that he will keep said premises in good repair \* \* at his own expense."

As a defense to the present action defendant set forth in his amended affidavit of merits in substance that, because of the failure of plaintiff to properly make the repairs above mentioned as Nos. 1 and 2, the premises became unsanitary and untenable and defendant was compelled to, and did, vacate the premises in September, 1915, and that he was not indebted to plaintiff in any sum.

From the beginning of the term of the lease May 1, 1916, defendant paid the monthly installments of rent reserved until the spring of 1917, when he refused to pay further rent, claiming that plaintiff had not fully performed his agreement to make repairs and that he had been refused permission to erect the garage by others claiming rights in the open space behind the rear yard. Plaintiff thereupon brought an action (not the present action) in the Municipal Court to recover the rent due and defendant set up his defense thereto as above mentioned.

While this former action was pending the parties, by their respective attorneys, entered into a settlement agreement in writing, dated June 28, 1917, as follows:

"Whereas John A. Cornell as lessor and Carl G. Bingham, lessee, entered into a lease dated March 4th, 1916, for the premises known as 1365 Hyde Park Boulevard, and said lease contained a clause as follows: 'Permission given to erect a portable garage in the rear yard and extending partly into open space behind yard.'

"Whereas the lessee claims that he has been refused permission to build a garage by others having rights in



the said open space referred to. Whereas the lessor claims that he is in nowise liable to lessee under the said lease. Whereas lessee claims that there are certain repairs which lessor should make, some of which lessor agrees and other he denies that is liable for.

"Now therefore, it is agreed between said lessor and lessee that said lessor shall and does hereby allow to said lessee the sum of one hundred fifty-seven and 40.100 (\$157.40) dollars, which sum is accepted by lessee in full of all damages and expenses sustained or to be sustained by lessee during the entire term of said lease by reason of any refusal or failure to obtain the right to erect the portable garage as contemplated by the permission contained in said lease. also in full settlement of all claims to date for the repairs to be made by lessor. The lessor, however, agrees to tint walls and ceiling of the bedroom injured by leak in roof; this settlement to include all damages sustained by lessee on account of leak in roof. The other terms of said lease to remain in full force and the monthly rental for balance of term to be paid as in said lease specified. The suit in Municipal Court, Cornell v. Bingham, to be dismissed without cost; each party to pay his own costs."

On July 11, 1917, defendant wrote plaintiff a letter, enclosing a check for \$75 for rent for the month of July, 1917, and saying that he was glad that a compromise had been effected by the attorneys and that it was in accordance with his desire.

After June 26, 1917, defendant remained in possession of the premises, and continued regularly to pay the monthly rent of \$75 until and including September, 1918, when he vacated the premises, moved to another residence and refused to pay further rent, because, as he testified, he had had "so much trouble with the house, with the leaky roof and the leaky walls, the sewage backing up, and the generally dilapidated condition."

Plaintiff testified in substance that he made all the repairs that he had agreed to make in his written agreement of March 4, 1916, with one exception, viz. the walk across the grass from the sidewalk to the street; that he was unable to build that walk because he could not get a permit from the South Park Commissioners, and that there was a walk connecting the





sidewalk with the street, though not exactly opposite the steps, which said Commissioners thought was sufficient; and that after said settlement agreement was executed he tinted the walls and ceiling of the bedroom injured by the leak in the roof.

Defendant testified that after plaintiff had installed the toilet in the basement, whenever there was a heavy rain the sewage would back up through the toilet and flood the basement floor and produced a stench; and that he made several complaints to plaintiff concerning this backing up of sewage before the settlement agreement of June 28, 1917 was made. Plaintiff testified in substance that the toilet in the basement had been properly installed; that after receiving defendant's complaints he tried to remedy the occasional condition by installing back pressure valves; that these corrected the difficulty to a great extent but not entirely, owing to the fact that the main sewer in 51st street was inadequate for the entire sewage of the neighborhood; and that occasionally after a heavy rain there would be a slight overflow in the basement but not enough to cause an unsanitary condition.

Under the facts and circumstances disclosed we are of the opinion that the finding of the court that defendant was liable under the lease for the rent reserved during the seven months that the premises remained vacant after their abandonment by defendant was correct. No point is made that after such abandonment plaintiff did not use due diligence to re-rent the premises. After defendant originally took possession under the lease disputes arose between the parties as to their respective rights thereunder and under plaintiff's written agreement to make repairs executed concurrently with the lease, and a suit was commenced. Finding that suit a compromise was effected by plaintiff allowing defendant a certain sum of money, which was accepted by the defendant in full settlement of the damages claimed by him and with the express understanding that the lease should continue in force and that



defendant was to pay thereafter the monthly rental during the balance of the term. Over a year after the compromise settlement defendant abandoned the premises, and, as a defense to plaintiff's subsequent suit to recover rent due under the lease, defendant sets up practically the same matters, which were the subject of the former controversy and which then had been finally settled. This under the law he cannot do. (Bichold Safe & Lock Co. v. Barnes, 53 Ill. App., 144; Adams v. Crown Coal & Tow Co., 198 Ill., 445; Bryenforth v. Palmer Pneumatic Tire Co., 240 Ill., 25.)

Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.

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250 - 26022

S. S. HERRY, Appellant,

vs.

ALMA SCHULTZ, Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 645

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 13, 1917, plaintiff, a real estate broker, commenced a first class action in contract in the Municipal Court of Chicago against defendant, the owner of an apartment building on Cornelia avenue, Chicago, to recover damages as claimed in the sum of \$1713, based upon a proposition in writing, dated November 1, 1917, and signed by defendant and by her husband, O. W. Schultz, and also signed on November 5, 1917, by Elizabeth J. Shaffer, the owner of another apartment building on the southwest corner of Merrill avenue and 70th street, Chicago, as follows:

"November 1, 1917.

S. S. Herry,  
Chicago, Ill.

For and in consideration of \$1 and other good and valuable consideration, receipt acknowledged, I hereby give you exclusive option to purchase my building at 700-02 Cornelia Ave., Chicago, subject to 1st mortgage of \$8,000 - 8½%, and will take in payment the building S. W. Cor. Merrill Ave., & 70th St., Chicago, subject to 1st mortgage of \$32,500-6% and to a 2d mortgage of \$6,500-6%. I will also give the sum of \$5000 in addition upon the passing of the deeds. Both buildings to have taxes, interest on mortgages, insurance and rents pro-rated to date of delivery of deeds. All special taxes or assessments levied for improvements completed are to be paid in full by the respective owners. Should you succeed in finding a purchaser as outlined above, I will pay you as commissions \$463. This option to be good and in force up to and including November 7, 1917.

(Signed) C. W. SCHULTZ,  
MRS. C. W. SCHULTZ.





Nov. 5, 1917 - 12 Noon  
The above proposition is  
hereby accepted by me.

(Signed) ELIZABETH J. SHAFFER."

Plaintiff alleged in his statement of claim in substance that, after defendant had signed and delivered to him said proposition in writing, he procured said Elizabeth J. Shaffer to accept the same in writing at the manner and at the time as thereon appears, and also caused said Elizabeth J. Shaffer to execute a written contract of exchange between herself and defendant "to more effectually carry out said written proposition and acceptance;" that it was agreed between said Elizabeth J. Shaffer and plaintiff that, out of the \$5000 to be paid by defendant as mentioned in said proposition in writing, she should pay plaintiff for his services in promoting the exchange of properties the sum of \$1250; that thereafter plaintiff presented to defendant said contract of exchange, and requested defendant to sign the same, but that defendant refused so to do and refused to make said exchange of properties; that thereupon plaintiff requested defendant to pay him the sum of \$463 mentioned in said proposition in writing as a commission and also to pay him said sum of \$1250; and that defendant has not paid said sums or any part thereof and refuses so to do.

Defendant alleged in her affidavit of merits in substance that she and her husband were induced to sign said proposition in writing upon plaintiff's representations (a) that the building on the corner of Merrill avenue and 70th street was just south of the South Shore Country Club and about one block from the lake, (b) that said proposition in writing should not be used by plaintiff except to induce said Elizabeth J. Shaffer to look at defendant's building, and that if she manifested a willingness to consider an exchange of properties defendant should then be given an opportunity



to inspect the building on the corner of Merrill Avenue and 70th street before entering into any contract for an exchange, and until such inspection by defendant was made said proposition in writing should not be in any way binding upon defendant, and (c) that plaintiff would act solely as agent for defendant and was to receive no commissions or other compensation from said Elizabeth J. Shaffer; that these representations were material ones, were relied upon by defendant, were false, were known by plaintiff at the time to be false, and were made for the purpose of deceiving and defrauding defendant; that said building was not located just south of said club about a block from the lake, but was in fact located about four blocks west of said club; that, in violation of his agency and the trust reposed in him, plaintiff procured said proposition in writing to be accepted by said Elizabeth J. Shaffer; that plaintiff acted as agent for her and was to receive a large commission from her if an exchange of said properties was effected; that defendant never entered into any contract of any kind with said Elizabeth J. Shaffer; and by reason of the foregoing plaintiff is not entitled to recover anything from defendant.

The cause was tried before a jury resulting in a verdict finding the issues against the plaintiff, on which verdict the court on January 10, 1926, entered judgment against the plaintiff and this appeal followed.

It appears from the evidence that, on the same day that the proposition in writing used upon was signed by defendant and her husband, plaintiff procured the following instrument to be signed by said Elizabeth J. Shaffer and delivered to him;

"Chicago, November 1, 1917.

Mr. J. S. Barry  
Chicago, Ill.

For & in consideration of \$1 and other good and valuable consideration, receipt acknowledged, I hereby



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give you exclusive option to purchase my building at the South-west corner of Merrill Ave. and 70th St., and said property subject to a first mortgage of \$32,500, at 6%, and to a second mortgage of \$6,500 at 6%, and as payment for this property will accept the building at 702 Cornelia St., Chicago, subject to a first mortgage of \$8,000, and in addition, \$5,000 cash, which sum is to be paid on passing of the deeds.

It is understood that taxes, interest on mortgages, insurance and rents are to be pro-rated to the day of delivery of the deeds. All special taxes or assessments, levied for improvements completed, are to be paid in full by the respective owners.

Should you secure a purchaser for my above mentioned property, I will pay you the sum of \$1,250. The agreement to be good up to and including November 8, 1917.

(SIGNED) ELIZABETH J. SHAFFER."

It further appears from the evidence that thereafter plaintiff drafted a contract for the exchange of properties upon a printed form, commonly known as the Chicago Real Estate Board form, bearing date November 3, 1917, in which said Elizabeth J. Shaffer is named as first party and defendant as second party; that in said draft the terms on which said proposed exchange was to be made are substantially the same as contained in the proposition in writing sued upon; that said draft contained a clause to the effect that commissions should be paid to J. M. Berry by the respective parties as theretofore agreed; and that plaintiff thereafter caused said Elizabeth J. Shaffer to sign said draft of contract.

It further appears from the testimony of defendant and her husband, C. W. Schultz, in substance that the latter was acting as the agent of defendant in conducting negotiations for the possible sale or exchange of defendant's property on Cornelia street, Chicago; that on Thursday, November 1, 1917, plaintiff called on C. W. Schultz at the latter's home and a long conversation was had during the latter part of which defendant was present and joined therein; that at this time neither defendant nor her husband had ever seen the apartment building owned by



Mrs. Shaffer; that during the interview plaintiff made the representations substantially as outlined in defendant's affidavit of merits; that, relying on said representations, both defendant and her husband signed the proposition in writing sued upon; that it was arranged that on Sunday morning, November 4, 1917, C. F. Schultz would inspect the building owned by Mrs. Shaffer; and that between November 1st and November 3rd Mrs. Shaffer called twice and inspected the Cornelia street building owned by defendant. It further appears from the testimony of C. F. Schultz that on Sunday morning, November 4th, he inspected the building owned by Mrs. Shaffer and the surrounding neighborhood; that he found the building located four blocks west of the South Shore Country Club and that portions of it were in a dilapidated condition; and that on the same afternoon with defendant's consent he telephoned plaintiff that defendant would not further consider making the proposed exchange of properties. Plaintiff in rebuttal denied that at the interview on November 1st, or at any other time, he made the representations to defendant, or to her husband, as testified to by them. It further appears that on November 6, 1917, plaintiff wrote a letter to defendant as follows:

"This is to notify you that your written offer dated November 1, 1917, addressed to me, has been accepted in its entirety by Mrs. Elizabeth Shaffer, and that she has signed and accepted your proposition.

Her attorney desires the abstract of your property at 700-02 Cornelia Ave. Chicago, and has tendered me the abstract of Mrs. Shaffer's property which I will deliver to you at any place you choose.

I am notifying you today as your offer is only good up to and including November 7, 1917."

After a careful examination of the abstract of the record we are of the opinion that the verdict of the jury and the judgment are amply sustained by the evidence.

It is contended that the trial court erred in allowing C. F. Schultz, the husband of defendant, to testify that he

The first of these is the fact that the  
Government has not been able to  
maintain a consistent policy in  
relation to the question of the  
rights of the Indians. It has  
at times been friendly to them,  
at times hostile, and at times  
indifferent. This has led to  
confusion and uncertainty among  
the Indians, and has done much  
to weaken their confidence in  
the Government. It has also  
led to a feeling of distrust  
among the white people, who  
have seen the Government  
treat the Indians in a  
fashion which they regard as  
unjust and unfair. This has  
done much to create a feeling  
of hostility between the two  
races, and has done much to  
weaken the bonds of friendship  
which have existed between them  
in the past.

The second of these is the fact that  
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done much to create a feeling  
of hostility between the two  
races, and has done much to  
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which have existed between them  
in the past.



was acting as defendant's agent in conducting negotiations for the possible sale or exchange of defendant's Cornelia street property. In Phillips v. Foulter, 111 Ill. App., 330, 332, it is said:

"While agency cannot be proved by the mere declaration of the agent, that fact does not render him incompetent to testify to facts and circumstances tending to show such agency."

(See, also, Richey v. Fred Miller Brewing Co., 180 Ill. App., 645, 647.) In the present case not only C. W. Schulte testified to facts and circumstances tending to show the agency, but the defendant testified that she had authorized him to act as her agent in conducting the negotiations. We do not think there is any merit in the contention.

It is further contended that certain statements contained in the oral charge of the court to the jury were erroneous and prejudicial to the defendant. We have examined the entire charge and are of the opinion that the jury were fairly and properly instructed and that no errors prejudicial to the defendant are contained therein.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.





PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error.

vs.

HERBERT WASHINGTON and  
WILLIAM CHILTON,

Plaintiffs in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

221 I.A. 645

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On May 12, 1920, the defendants Herbert Washington and William Chilton, were indicted on the charge of feloniously and burglariously entering the store of Hyman Segal on April 13, 1920, and stealing and taking away certain cigars and cigarettes then in said store and belonging to said Segal, with felonious and burglarious intent, etc. On the day of the trial, the state's attorney waived the felony charge and both defendants pleaded not guilty to the charge of petit larceny and waived their right of trial by jury. After hearing evidence both on behalf of the People and on behalf of the defendants, the trial court found the defendants guilty, found the value of the property stolen to be \$14, adjudged each defendant guilty of petit larceny and sentenced each to confinement in the House of Correction for a period of six months and to pay a fine of one dollar. This writ of error is sued out to reverse the judgment.

Practically the sole contention here made by counsel for defendants is that the evidence is insufficient to sustain the finding and judgment.

On behalf of the People Hyman Segal testified in substance that he ran a saloon on the corner of 31st and State streets, Chicago; that upon arriving at the saloon on the



morning of April 13, 1920, he found that his place had been burglarized during the previous night; that he found that the side door was broken; that certain cigars and cigarettes of the value of \$14 and belonging to him had been taken away; but that he did not know who had carried away his said property. Robert Chaney testified in substance that he was engaged in the restaurant business, located at 5058 State street; that he knew both defendants well as they were accustomed to come into the restaurant nearly every night; that on the evening of April 12, 1920, "these two boys" (indicating the defendants) came into his restaurant about 9 p. m., then left, and returned about 1:30 a. m. on the morning of April 13, 1920, and then left again; that shortly after the defendants left the restaurant the second time a man informed him (Chaney) that someone was trying to break into the saloon, which is No. 5060 State street and is on the corner of 51st street; that he (Chaney) then immediately went out of the back door of the restaurant into the alley and walked south to 51st street; that when he got to 51st street he saw the defendant, Chilton, about 25 feet away, "leaning against the door and shoving up against the door, placing his shoulders like this (indicating an upward and forward movement against the door);" that he also saw the defendant, Washington, who "was standing at the corner of 51st and State streets, looking up and down;" that he watched the defendants about two minutes and then returned to the restaurant because he had an order to fill; that he did not go back to 51st street to see if defendants had broken into the saloon. But that he was informed the following morning by Mr. Segal that the saloon had been broken into. Mamie Blackwell testified in substance that she was an employee at said restaurant and was working there at the night in question; that when Chaney went





out into the alley she followed him; that she saw the defendant, Chilton, "leaning up against the door, and I saw him push the door with his shoulder;" that the other defendant, Washington, was standing out on the sidewalk; and that she went back into the restaurant when Chaney did.

Both defendants denied that they were either in the restaurant or at Segal's saloon that night, and both denied, when arrested, that they knew anything about the matter. Washington testified that he was at his mother's home the entire night and did not see Chilton at any time during the night. In this he was corroborated by his mother, Mrs. Anna Washington, residing at 3625 State street, who testified that her son came to her rooms about nine o'clock and joined in a game of cards until a late hour; when "I made him spend the night with me, because I didn't want him to get into anything." Washington further testified, without objection being interposed, that he had been arrested for larceny about a year previous, and had been in the House of Correction. Chilton testified that about eight o'clock on the evening of April 12th he took his mother over to the home of a Mr. Clint, where they remained until about 10:30 p. m. receiving instructions regarding an election the next day; that he then returned home with his mother where he remained until five a. m. on the morning of April 13th; and that his mother had had previous trouble with the witness, Chaney, in that she had challenged his vote at a previous election and he had threatened to strike her. In all these particulars Chilton's testimony was corroborated by that of his mother, but Chaney, in rebuttal, testified that he had never any trouble with Washington or Chilton, or the latter's mother.

The trial court did not believe the alibi defense made by the defendants and so stated during the trial. In

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view of the positive testimony of the witnesses, Chaney and Mamie Blackwell, we are unable to say that the court's finding was wrong. He saw all the witnesses, heard them testify, observed their manner and demeanor while on the stand, and was the better enabled to test their credibility.

But it is here argued by counsel for defendants that the People failed to prove that the defendants broke into Regal's saloon and that they took and carried away the cigars and cigarettes and that, therefore, the charge of larceny was not sufficiently proved. The evidence showed that the saloon had been broken into and the cigars and cigarettes taken during the night. It is true that no witness testified that he saw the defendants, or either of them, actually enter the saloon, or that he saw the defendants, or either of them, in the act of taking the property stolen. Two witnesses, however, testified that they saw one of the defendants in the act of attempting to break into the saloon, while the other was on guard at the corner or on the sidewalk. The hour was 1:30 o'clock in the morning, and later in the morning, after it had become daylight and Regal had arrived at his place of business, he found that the side door had been broken into and his property taken away. We think that the circumstances show that these acts had been done by the defendants and with a felonious intent. While it is true that it is essential on the charge of larceny to prove that the accused wrongfully took and carried away the property of another, (Harris v. People, 204 Ill. 233); it is also true that this fact may be proved by circumstantial evidence. (Carroll v. People, 136 Ill. 456, 462.) In People v. Goodwin, 263 Ill. 99, 102, it is said:

view of the results of the investigation, it is  
 likely that the results of the investigation will be  
 similar to those of the investigation, and that the  
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"Circumstantial evidence may be resorted to for the purpose of proving the corpus delicti in the same way and to the same extent that it may be for the purpose of connecting the accused with the commission of the offense. 'It is seldom that either of these can be proved by direct testimony, and therefore the fact may lawfully be established by circumstantial evidence, provided it be satisfactory.' 3 Greenleaf on Ev.,-16th ed. sec. 30; Carroll v. People, 136 Ill. 456)."

In our opinion the guilt of the defendants of the crime of larceny was established beyond a reasonable doubt.

The judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

Barnes, F. J., and Matchett, J., concur.



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Final Judgment 1921

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26993.

CITY OF CHICAGO,

Appellee,

vs.

THOMAS PLONZEK,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

221 I.A. 645

OPINION PER CURIAM.

Appellant was convicted in the trial court of a violation of Sec. 2012 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$6.50. In default of the payment of said fine and costs appellant was committed to the house of correction, there to remain imprisoned at hard labor until said fine and costs were paid, etc., from which judgment and sentence he prayed for, obtained and perfected an appeal to this court to the March term, 1921, thereof.

Appellant, however, failed to bring the record to this court within the time provided by statute. Appellee has caused the case to be docketed and has filed a short record and now moves that in accord with Sec. 100, Chap. 110 R. S., that the judgment of the Municipal court be affirmed. Sec. 100 supra provides that this court may, in the condition of the record in this case, on motion either affirm the judgment or dismiss the appeal.

For the reasons set forth in City of Chicago v. Nathan Salmitsky, 210 Ill. App. 159, the motion of appellee to affirm the judgment of the Municipal court is allowed and the judgment is affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.

1. STATE OF NEW YORK  
 COUNTY OF ALBANY  
 1928

Appellant was convicted in the trial court on a violation of Sec. 2028 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$4.00. In appeal of this judgment of said fine and costs appellant was committed to the House of Correction, there to remain until payment of said fine and costs were paid, etc., from which judgment and sentence he moved for, obtained and reversed as appears in this record of the Court of Sessions.

Appellant, however, failed to bring the record on this point within the time provided by statute. Appellant has caused the same to be docketed and has filed a motion for reversal of the Municipal Court judgment. The Municipal Court judgment is reversed. The Municipal Court judgment is reversed. In the consideration of the record in this case, on motion of the appellant the judgment of the Municipal Court is reversed.

For the reasons set forth in People v. [Name], 130 App. Div. 2d, 130, the motion of appellant is granted. The judgment of the Municipal Court is reversed and the appellant is released.

26994.

CITY OF CHICAGO,

Appellee,

vs.

MORRIS STEUBEN,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 645

OPINION PER CURIAM.

Appellant was convicted in the trial court of a violation of Sec. 2012 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$6.50. In default of the payment of said fine and costs appellant was committed to the house of correction, there to remain imprisoned at hard labor until said fine and costs were paid, etc., from which judgment and sentence he prayed for, obtained and perfected an appeal to this court to the March term, 1921, thereof.

Appellant, however, failed to bring the record to this court within the time provided by statute. Appellee has caused the case to be docketed and has filed a short record and now moves that in accord with Sec. 100, Chap. 110 R. 2., that the judgment of the Municipal court be affirmed. Sec. 100 supra provides that this court may, in the condition of the record in this case, on motion either affirm the judgment or dismiss the appeal.

For the reasons set forth in City of Chicago v. Nathan Salmitsky, 210 Ill. App. 159, the motion of appellee to affirm the judgment of the Municipal court is allowed and the judgment is affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.





26995.

CITY OF CHICAGO,

Appellee,

vs.

ABE GREENBERG,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 646

OPINION PER CURIAM.

Appellant was convicted in the trial court of a violation of Sec. 2012 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$6.50. In default of the payment of said fine and costs appellant was committed to the house of correction, there to remain imprisoned at hard labor until said fine and costs were paid, etc., from which judgment and sentence he prayed for, obtained and perfected an appeal to this court to the March term, 1921, thereof.

Appellant, however, failed to bring the record to this court within the time provided by statute. Appellee has caused the case to be docketed and has filed a short record and now moves that in accord with Sec. 100, Chap. 110 R. S., that the judgment of the Municipal court be affirmed. Sec. 100 supra provides that this court may, in the condition of the record in this case, on motion either affirm the judgment or dismiss the appeal.

For the reasons set forth in City of Chicago v. Nathan Salmitsky, 210 Ill. App. 159, the motion of appellee to affirm the judgment of the Municipal court is allowed and the judgment is affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.

[illegible]

26996.

CITY OF CHICAGO,

Appellee,

vs.

AL. CARNEY,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

221

16

OPINION PER CURIAM.

Appellant was convicted in the trial court of a violation of Sec. 2012 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$6.50. In default of the payment of said fine and costs appellant was committed to the house of correction, there to remain imprisoned at hard labor until said fine and costs were paid, etc., from which judgment and sentence he prayed for, obtained and perfected an appeal to this court to the March term, 1921, thereof.

Appellant, however, failed to bring the record to this court within the time provided by statute. Appellee has caused the case to be docketed and has filed a short record and now moves that in accord with Sec. 100, Chap. 110 R. 3., that the judgment of the Municipal court be affirmed. Sec. 100 supra provides that this court may, in the condition of the record in this case, on motion either affirm the judgment or dismiss the appeal.

For the reasons set forth in City of Chicago v. Nathan Salmitsky, 210 Ill. App. 159, the motion of appellee to affirm the judgment of the Municipal court is allowed and the judgment is affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.

[illegible]



26997.

CITY OF CHICAGO,

Appellee,

vs.

JULIUS BELGRADE,

Appellant.

11668a  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 646

OPINION PER CURIAM.

Appellant was convicted in the trial court of a violation of Sec. 2012 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$6.50. In default of the payment of said fine and costs appellant was committed to the house of correction, there to remain imprisoned at hard labor until said fine and costs were paid, etc., from which judgment and sentence he prayed for, obtained and perfected an appeal to this court to the March term, 1921, thereof.

Appellant, however, failed to bring the record to this court within the time provided by statute. Appellee has caused the case to be docketed and has filed a short record and now moves that in accord with Sec. 100, Chap. 110 R. S., that the judgment of the Municipal court be affirmed. Sec. 100 supra provides that this court may, in the condition of the record in this case, on motion either affirm the judgment or dismiss the appeal.

For the reasons set forth in City of Chicago v. Nathan Salmitsky, 210 Ill. App. 159, the motion of appellee to affirm the judgment of the Municipal court is allowed and the judgment is affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.



840 A. I. 120

[illegible]

1. The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation.

26998.

CITY OF CHICAGO,

Appellee,

vs.

JAMES MOGLEY,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 646

OPINION PER CURIAM.

Appellant was convicted in the trial court of a violation of Sec. 2912 of the Municipal Code and sentenced to pay a fine of \$200 and also the costs of \$6.50. In default of the payment of said fine and costs appellant was committed to the house of correction, there to remain imprisoned at hard labor until said fine and costs were paid, etc., from which judgment and sentence he prayed for, obtained and perfected an appeal to this court to the March term, 1921, thereof.

Appellant, however, failed to bring the record to this court within the time provided by statute. Appellee has caused the case to be docketed and has filed a short record and now moves that in accord with Sec. 100, Chap. 110 R. S., that the judgment of the Municipal court be affirmed. Sec. 100 supra provides that this court may, in the condition of the record in this case, on motion either affirm the judgment or dismiss the appeal.

For the reasons set forth in City of Chicago v. Nathan Salmitsky, 210 Ill. App. 159, the motion of appellee to affirm the judgment of the Municipal court is allowed and the judgment is affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.



199 - 26372

JOSEPH F. THISKA,  
Appellee,

vs.

STOCKMEN'S TRUST & SAVINGS  
BANK, a Corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

221 I.A. 646

MR. PRESIDING JUSTICE HILDON  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it of \$9500 entered upon the verdict of a jury. The action is for fraud and deceit.

As no question arises upon the pleadings it is unnecessary to set them out.

Plaintiff avers in his declaration and testifies that on the morning of October 20, 1912, between the hours of 9:30 and 10 o'clock, he called on the telephone the Stockmen's Trust & Savings Bank; that he asked for the cashier of the bank, who responded, whereupon, plaintiff testified, he asked the cashier if the check of William T. Kirby for \$10,000 was good; that plaintiff knew that Wood was cashier of the bank; that he was acquainted with him, had met him once, was not personally acquainted with him but had frequently talked with him on the telephone and had dealt with him as the cashier of the bank; that he recognized his voice at the other end of the wire when he telephoned; that he told Mr. Wood, the cashier, that Mr. Kirby had just asked him to cash a \$10,000 check for him, and he asked Mr. Wood if the check was good, to which he replied "Yes, that is all right;" that plaintiff said it was a large amount and he wanted to be sure that it was all right, that the funds were there, and Wood said, "Well, just wait a minute;" that he came back in a little while and said, "Yes, that is all





right." I said, 'The funds are there, are they?' and he answered 'Yes.' He said 'The check is all right, the check is good,' and that was all, and I said, 'Thank you' or something of that kind and hung up;" that in faith of this conversation, plaintiff claims, he did cash Kirby's check for \$10,000 and put the check in course of collection through the Chicago Savings Bank and Trust Company, but the check was returned without being paid.

In contradiction to this evidence of plaintiff,

Wood, the cashier, testified by deposition that he was at that time connected with the Johnston City Coal Co. at Johnston City, Illinois, and had been since August, 1916; that before that time he was with the Harris Trust & Savings Bank of Chicago, and before that was cashier of the Stockmen's Trust & Savings Bank; that he became such cashier on February 15, 1906, and continued as such cashier until December 31, 1912, performing the usual and customary duties of a cashier. He denied any acquaintance with plaintiff and also denied that he had any conversation over the telephone on or about October 29, 1912, with Triska or anyone else connected with him. He further testified that Triska did not call him on the telephone on or about October 29, 1912, and ask him if a check for \$10,000 signed by Kirby was good; that he did not at any time have any conversation with Triska or anyone connected with the Slavic-American Savings Bank in regard to a \$10,000 check of Kirby drawn on the Stockmen's Trust and Savings Bank; that he knew the Kirby Savings Bank and that it was a customer of the defendant bank in 1912; that plaintiff did not, nor did any other person, in the month of October, 1912, ask him in regard to whether a \$10,000 check signed by Kirby was good; that he did not on that date have any conversation with plaintiff or any person connected with his bank regarding the condition of the account of the Kirby Savings Bank in the defendant bank.



The only other witness who testified regarding the telephone communication of plaintiff with the defendant bank was the cashier of the Slavic-American Savings Bank, who testified to having called for the cashier of the defendant bank on October 29, 1912, on the telephone; that when the cashier came to the 'phone plaintiff lifted up an extension 'phone and spoke to someone. This witness heard no conversation and made no attempt to testify to any conversation at that or any other time between plaintiff and the cashier of the defendant bank.

At the time of the incidents above recited Triska, the plaintiff, was conducting a private bank under the name of Slavic-American Savings Bank, and William T. Kirby was likewise operating a private bank under the name of Kirby Savings Bank.

The original Kirby check was lost, and by agreement of the parties a copy was introduced and received in evidence. The check is as follows:

"KIRBY SAVINGS BANK  
5021 South Ashland Ave..  
Chicago, Oct. 29th, 1912.

Pay to the order of Slavic-American Savings Bank  
\$10,000.00 Ten Thousand & 00/100 Dollars  
To Stockmen's Trust & Savings Bank,  
Chicago, Illinois.

Daniel J. Kirby,  
Cashier."

Endorsed on this check is the following:

"Pay to the order of Chicago Savings Bank and  
Trust Company.

All prior endorsements guaranteed  
Slavic-American Savings Bank  
James A. Calch,  
Cashier.

"Oct. 29, 1912

Pay to the order of any Bank, Banker or Trust Co.  
All prior endorsements guaranteed  
Chicago Savings Bank & Trust Co.  
Chicago, Ills."

There are no further endorsements on the check.



Plaintiff testified that after receiving the check he sent it to the Chicago Savings Bank & Trust Company for deposit and collection. So far as can be gathered from the testimony, it would appear that the check was sent to the Chicago Savings Bank & Trust Company, and by that bank sent through the mails to the defendant bank. Subsequently plaintiff proved the claim on the check in bankruptcy against Kirby and received <sup>as</sup> a dividend thereon the sum of \$670.

Whatever the rights of plaintiff may be under the proofs, the foundation upon which these rights must find support - and without such support the action must fail - is maintaining by a preponderance of proof the conversation which plaintiff swears he had with the cashier of defendant on the morning of October 29, 1912. The question is, was any such conversation proven by the evidence. Plaintiff has no support to his testimony of such conversation, nor is there any circumstance in the case lending verity to it. The fact that the cashier of plaintiff swore that he called defendant on the 'phone that morning and asked for its cashier is without probative force in view of the fact that he did not hear any conversation between the parties or that was said by either of them, nor did he hear plaintiff talk on that occasion through the telephone. In contradiction of plaintiff's claim that he had such a conversation with Wood, the cashier of defendant bank, Wood definitely and categorically denies the alleged telephone conversation in toto. Therefore it is clear that plaintiff has failed to maintain by a preponderance of proof, which the law requires as an elementary proposition, the claim that defendant made the representation that Kirby's account with defendant bank on the morning of October 29, 1912, was good for his check of \$10,000. In this condition of the record we find plaintiff's affirmative statement met by defendant's positive denial. One in a measure offsets the other, and there is in conse-





quence no preponderance of proof to sustain plaintiff's contention in this regard. Lacking such quantum of proof, there can be no recovery.

As this court said in Baker et al. v. Abbott Mfg.

Co., 212 Ill. App. 476:

"On the disputed point there were two witnesses, one for each of the parties. Their testimony was divergent. \*\*\* On the theory that each of these two witnesses was equally credible, the company did not sustain that part of its defense by a preponderance of the proof."

In Danelson v. E. St. L. Ry. Co., 235 Ill. 625, the Supreme court held that the constitution does not take the jury the final judges of the weight of evidence. Berg v. U. S. F. & I. Ry. Co., 162 ibid 348; City of Spring Valley v. Abel Co., 173 ibid 497. In the Danelson case the court also said:

"If a verdict is manifestly against the weight of the evidence, it is not necessary that it should further appear that it is not the result of the impartial and honest judgment of the jury, nor that it resulted from prejudice, passion, or some improper motive or condition. To permit a verdict, which is clearly and manifestly against the weight of the evidence, to stand, upon the supposition that the jury were impartial and honest, would be as unjust and injurious to the defeated party as though it proceeded from passion, prejudice, or some improper motive."

This court said in J. C. R. R. Co. v. Cunningham,

102 Ill. App. 256:

"The mere fact that a jury have passed upon the questions of fact cannot absolve this court from the duty of determining whether or not the verdict is justified by the evidence. That duty is by the statute placed upon this court."

This rule was reiterated in Harold v. Tilley, 134

ibid 1.

In Leavenworth v. C. & N. W. Ry. Co., 197 ibid 379, it was held that when the Appellate court upon review determines that the evidence fails to sustain the verdict it may reverse the judgment with a finding of fact.

In Fraefel v. U. C. Ry. Co., 202 ibid 131, we held that this court was not restrained, as is the trial court, from



determining the probative force of the evidence, and may reverse a judgment with a finding of fact when in its opinion the evidence fails to sustain the judgment.

Therefore, as the foundation upon which the superstructure of this case is builded has in a measure crumbled away for the lack of a preponderance of proof to sustain it, regardless of all other questions in the case plaintiff's action fails, the judgment of the Circuit court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Bever and McCurely, JJ., concur.





The court finds as an ultimate fact that defendant is not guilty of the false representations or untrue statements charged against it in plaintiff's declaration or any count thereof.

# THE

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THE

301 - 22475

SARAH V. BROWN,  
Appellee.

vs.

GARDEN CITY UNHOLSTERING  
CO., a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 647

MR. PRESIDING JUSTICE HULDON

DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer in which plaintiff had judgment against defendant for possession, from which judgment defendant prosecutes this appeal.

The case was tried before the court without the intervention of a jury.

The term of the demise was five years, terminating by efflux of time on April 30, 1934. The premises leased were numbered 2440, 2442, <sup>2444,</sup> 2446 and 2448 West Twenty-second street, Chicago, and were to be occupied for manufacturing purposes.

The lease was executed for plaintiff by one Charles H. Gadey as her agent, who also collected the rent paid under the lease. This lease was negotiated by Gadey as agent. The judgment was grounded upon the alleged violation of that clause of the lease which provides that defendant, the lessee, "will not allow said premises to be used for any purpose that will increase the rate of insurance thereon, nor for any purpose other than that hereinbefore specified, nor to be occupied, in whole or in part, by any other person, and will not sublet the same, nor any part thereof, nor assign this lease, without in each case the written consent of the party of the first part first had, and will not permit any transfer, by operation of law.""

It appears that one of the violations of the foregoing clause is predicated upon defendant's subletting the one

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story portion of the premises known as 2448 West Twenty-second street to the North Side Lash and Door Company without securing the written consent of the lessor. This subtenant took possession of 2448 West Twenty-second street before defendant moved into the other portion of the demised premises. The North Side Lash and Door Company occupied, as such subtenant, for a period of about nine months. The subletting to and possession by the North Side Lash and Door Company, it is claimed by defendant, were known both to Gadey, the agent, and plaintiff, the lessor. Rent for all the demised premises was paid to and received by the agent during the period of the subletting and occupancy of the North Side Lash and Door Company.

It appears that to minimize the insurance premiums a certain parapet was built on a certain part of the demised premises and that by agreement between the parties defendant paid one-half of the cost of the erection of such parapet, being \$382, for which plaintiff received a check, and that plaintiff talked with defendant regarding the increase in insurance rates, attributing such increase to the occupancy of the North Side Lash and Door Company, and in addition to paying half of the expense of erecting the parapet defendant by agreement paid an additional sum of \$51.16 a month to cover increased insurance premiums, occasioned by the occupancy of the North Side Lash and Door Company of that portion of the demised premises above described.

It also appears that after the North Side Lash and Door Company vacated the premises, that portion occupied by them remained unoccupied and unrented for about a month, and that on January 16, 1930, defendant sublet the premises formerly occupied by the North Side Lash and Door Company to the Masford Manufacturing Company for a period of two years. This was likewise accomplished without the written consent of plaintiff. This subletting,





it is claimed, was also known to plaintiff and her agent.

It is claimed by defendant that plaintiff visited the premises in the early part of 1920, at which time she is said to have talked with defendant's president about the occupancy of the Asaford Manufacturing Company, the president telling plaintiff that they had procured a cleaner tenant.

The Asaford Manufacturing Company had a sign two by three feet, with black letters five inches high, tacked to the door frame entrance on the outside of the building, with the words inscribed thereon, "Asaford Manufacturing Company, Advertising Specialties." This tenant subsequently changed its corporate name to Adcraft Manufacturing Company and the sign was changed to comport therewith.

It is claimed that plaintiff in June, 1920, made the discovery that defendant was receiving rental from the Adcraft Manufacturing Company which made the subletting profitable. It is admitted that plaintiff received a check for the rent of the entire leased premises for the month of June amounting to \$31.16 and that such check was deposited in the bank account of plaintiff in the usual way. On July 20, 1920, plaintiff had defendant served with a notice terminating the term for the violation of the covenant against subletting and commanding that it quit the premises.

It is the opinion of the court that receiving a check for the June rent can in no sense be regarded as a waiver of the covenant against subletting, because the check was received after the discovery that defendant had offended against the subletting covenant.

We are further of the opinion that plaintiff did not waive the covenant against subletting and that the mere fact of acceptance of the rent subsequent to and with knowledge



of such subletting did not constitute a waiver of the breach of that covenant. One of the express provisions of the lease is that acceptance of the rent accruing after a breach shall not operate as a waiver of the right to forfeit the lease. Moreover, while Gadey, the agent, had authority to make the lease and collect the rent thereunder, there is no evidence that he had any express or implied authority to waive the condition of the lease against subletting the premises or any part thereof, so that the knowledge of the agent, if any he had, cannot be imputed to plaintiff; and there is no proof that he was a general agent having absolute charge and control of the property. The principle is laid down in 31 Cyc. 1387, that "presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it; nor has the agent any implied power to waive or give up any rights or interests for his principal, nor to increase his obligations and liabilities for the mere benefit of third persons, unless the principal knew or approved of such modifications by the agent." Whitland v. Iyer, 133 N. Y. 97; Holliday v. Underwood, 90 Ill. App. 130; Bulligan v. Hollingworth, 99 Fed. Rep. 216.

The fact that there were two breaches of the covenant in the lease against subletting before plaintiff gave notice to terminate the lease for a violation of that covenant, is in no sense a waiver of the covenant by plaintiff.

We are of the opinion that there is no error in the record justifying a reversal, and the judgment of the Municipal court is therefore affirmed.

AFFIRMED.

Dever and McGuire, JJ., concur.





MARGARET FLUARD,

Appellee.

vs.

THE MACCABEES, a Corporation.

Appellant.

APPEAL FROM CIRCUIT COURT OF  
COOK COUNTY.

221 I.A. 647

MR. PRESIDING JUSTICE MOLDON

DELIVERED THE OPINION OF THE COURT.

In an action upon a benefit certificate in the defendant order there was a verdict for \$2250 and a judgment thereon in favor of plaintiff, and defendant appeals.

James C. O'Brien on August 14, 1899, made an application for membership in the defendant order, representing therein that he was born in Chicago May 9, 1865, and that on his last birthday he was forty-four years of age. August 30, 1899, defendant issued to O'Brien a benefit certificate which was thereafter surrendered and a new certificate issued to him August 11, 1904. May 4, 1916, O'Brien made an affidavit that his benefit certificate last issued had been lost and the certificate in suit was issued to him May 12, 1916, which is payable to plaintiff, his daughter. The benefit certificate contains the following provision:

"Issued in place of lost certificate \*\*\* This certifies that \*\*\* James C'Brien has been regularly admitted to membership in the Maccabees. \*\*\* This certificate is issued because of an application for membership and medical examination furnished by the member in writing, signed by him and warranted to be absolutely true in every particular as written, which application, medical examination, laws of the association in force at maturity of contract and this certificate constitute the contract between the member and the association.

"That at his death two thousand dollars will be paid as a benefit to Margaret Fluard bearing relationship to him of daughter upon actual proof of death \*\*\* provided always that his application for membership and medical examination are absolutely true as written\*\*\*."

Under the charter of defendant order, to be eligible for membership persons must be between the ages of eighteen and

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fifty-one years. The member, James O'Brien, died August 23, 1917. Proofs of death were duly furnished. The material facts of the case were stipulated. The whole case rests upon the question of the age of James O'Brien.

Defendant contends that O'Brien was more than fifty-one years old at the time he joined the defendant order, and hence was ineligible as a member under its charter and by-laws. On the other hand plaintiff's contention is that O'Brien's age was correctly stated.

O'Brien was born in Chicago prior to the great fire of 1871. Such vital statistics, if any, that existed prior to that calamity were destroyed in it, so that there is no public record of the birth of James O'Brien. The membership certificate in suit is that of date May 12, 1916. There was no proof that the original application of James O'Brien of August 14, 1899, was the application for the policy of May 12, 1916, in suit, and such application for the original certificate was not by the terms of the certificate in suit made a part thereof by any recitation or provision in such certificate, and there is no presumption in law that such original application is a part of the later policy. Helson v. Assur. Soc., 73 Ill. App. 133.

When the new certificate was issued O'Brien released defendant from all liabilities under the original. This leaves the rights of the parties to be measured by the terms of the certificate in suit. Furthermore, the statement of the insured as to his age was a representation and not a warranty. Summa v. Cent. Acc. Ins. Co., 326 Ill. 444, reversing the decision of this court in the same case in 124 Ill. App. 32, where this court erroneously held such an answer to be a warranty and not a representation.

James O'Brien was a member of defendant for about eighteen years at the time of his death, during which time he paid all





assessments made against him. It appears that shortly before his death a representative of defendant, one Fitzgerald, told the insured, O'Brien, that his policy was void because of alleged misrepresentation as to his age, and tendered to O'Brien a return of assessments paid defendant on his membership certificate, informing him that defendant would accept no more assessments from him on his certificate. At that time Fitzgerald said that when O'Brien joined the order he was fifty-two years old, but O'Brien replied that he was only forty-four years old at the time he joined the order and that he gave his right age and refused to accept the check offered for assessments theretofore paid. Plaintiff testified to these facts, and further testified that the conversation was had in the presence of "my daughter and my sister, Mrs. Gibbons."

It is contended that the conversation with Fitzgerald was self-serving and therefore inadmissible. We think this evidence was admissible as part of the res gestae. Fitzgerald was the agent of defendant and collected assessments from O'Brien, and in what he did and said on that occasion he was acting as the agent of defendant. The matter of O'Brien's age was the reason given by this agent for his attempt to cancel O'Brien's membership certificate. The court's ruling that it was admissible was without error.

A daughter of O'Brien testified for defendant that in a conversation with her father she said to him, "You are a pretty tired looking thing, old Dad," and he said, "Yes," and she said, "Well, you are not very young now, you are getting pretty old," and he said, "Yes," he was getting pretty old. She then said, "How old are you now?" and he started to laugh and then she volunteered to tell him how old he was and she got a book and showed it to him and he said, "Yes, that is my age all right, but I don't see why you are keeping that book. That is the only record of my age and it could cause trouble. The record of my age was





burned during the fire."

It was not proven who wrote the names and dates in the book, nor when they were written. The book is in a dilapidated condition and seems to have been used for the purpose of keeping accounts of groceries, vegetables, etc. There is nothing to show that the names and ages were records of the birth of any of the parties named, but they appear upon a page beside seventeen items of articles usually sold in a grocery store, with three items of cash. We have no doubt that the jury regarded the writing in this book as of no probative value in the light of the representation of O'Brien and the testimony of his sister, Mrs. Mary Gibbons, who at the time of the trial testified that she was sixty-seven years old, and that her brother was three years younger than she and that he was forty-four years old at the time he joined defendant order. She further testified that, "My father and mother did not ever, to my knowledge, write," and that she never saw the book above referred to except in court the day she testified.

The sisters of plaintiff who testified for defendant showed some animus against plaintiff, which may have led the jury to discredit their evidence, and they also showed distinct hostility to their father during the latter years of his life.

From a consideration of all the testimony the jury were justified in concluding, as they did by their verdict, that James O'Brien made no false representation to defendant as to his age at the time the certificate in suit was procured from and issued by it to him.

The judgment of the Circuit court being without error is affirmed.

AFFIRMED.

Dever and McGuire, JJ., concur.



398 - 26572

JOSEPH FENDLER,  
Appellee,

vs.

JOHN T. SARACINO,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 647

MR. PRESIDING JUSTICE HOLDOM  
DELIVERED THE OPINION OF THE COURT.

In an action for malicious prosecution plaintiff had a verdict for \$600, and upon a remittitur of \$100, a judgment thereon of \$500. Defendant, claiming that in the record there is reversible error, prosecutes this appeal.

It appears from the evidence that defendant maintained at 1452 North Clark street a taxicab garage, and that for six months prior to September 1, 1918, plaintiff was in the employ of defendant, part of the time driving a car and part of the time working as night foreman on the main floor; that Sunday, September 1, 1918, was the first "assolutes Sunday;" that on these Sundays no cars were to be operated from Saturday night until five o'clock Sunday morning, except in cases of emergency; that on Sunday, September 1st, defendant left plaintiff in charge of the garage at about six o'clock in the evening, at which time all the cars were in the garage. Plaintiff claims that defendant told him he need not stay around, but to keep an eye on the place; defendant denies this, but claims that he told plaintiff to lock the garage and let nobody in, that no cars were going out and no gas could be sold. Plaintiff swore that he immediately left the garage and did not return until one o'clock the next morning, though between eight o'clock at night and one o'clock in the morning he passed the garage but did not stop.





Defendant visited his garage on Monday morning and noticed that a certain Paige car was muddy and that the tires were in bad condition, although the car had been washed the previous night and the tires were then in good condition. Defendant was informed by a competitor that the car went out of defendant's garage at about eleven o'clock Sunday night. Defendant testified that after stating the principal facts to a lawyer he was advised by the lawyer to take out a warrant for the arrest of plaintiff. Thereafter on the 6th of September, 1918, defendant swore to a complaint against plaintiff, charging him with being guilty of violating section 15 of the Motor Vehicle Laws of this State, and that he ran an automobile in the absence of the owner without the owner's consent. Plaintiff was arrested, held in jail, and thereafter tried on said charge before a Judge of the Municipal court, was found not guilty and discharged, and the prosecution ended because the court thought there was no probable cause to believe plaintiff guilty of the charges made against him.

It is argued for reversal that there is no competent evidence in the record that any order was entered discharging plaintiff in the offense charged against him by defendant; error in rulings on evidence; that the verdict is against the weight of the evidence; that the advice of counsel, shown by the evidence, was a complete defense to plaintiff's claim; and that the court erred in refusing to instruct a verdict in favor of defendant.

The court record in the criminal case<sup>was</sup> offered in evidence, and this showed that on October 1, 1918, on a trial by the court plaintiff was found not guilty and was discharged. This was sufficient evidence of the termination of the prosecution. It was not necessary to offer a certified copy of the record, as the trial Judge had a right to take judicial notice



of the record of the Municipal court.

It is argued that there is no order showing that plaintiff was discharged on the trial. The statement of claim averred that plaintiff was discharged and the prosecution ended, and in an affidavit of merits defendant did not deny either statement. Under the practice in the Municipal court matters alleged in the statement of claim and not denied by the affidavit of merits stand admitted. Marr v. Chicago Daily News, 194 Ill. App. 322.

Whether defendant made a full disclosure to counsel of the facts upon which such counsel's advice was predicated, advising the prosecution, was one of fact for the jury. Lyons v. Kantor, 285 Ill. 336.

There is no evidence in the record that plaintiff took or used the car of defendant as he was charged with doing in the criminal prosecution, nor does it appear that defendant stated to his counsel when he sought his advice that he had any evidence that plaintiff took his car out of the garage in violation of the statute supra, nor did defendant prove any such fact upon the trial.

We think, all the evidence considered, that the jury might reasonably find that the prosecution of plaintiff by defendant was without probable cause, and that there was no evidence in the record that defendant made a full disclosure of all the facts to his counsel on which such counsel advised that probable cause for a criminal prosecution against plaintiff existed, and that therefore the advice of counsel was not a defense.

At the time defendant moved for an instructed verdict the record presented sufficient facts upon which the jury would be warranted in returning a verdict for plaintiff.

There is no error in the rulings upon evidence, as the



questions to which objections were sustained were brought out on answers to other questions by counsel.

So think the jury were justified in finding that defendant was actuated by malice in causing the arrest of plaintiff. This appears from a conversation between them at the time defendant discharged plaintiff from his service, defendant paying him twenty-five dollars, plaintiff claiming it should be fifty dollars, as he had paid a deposit of twenty-five dollars to defendant. Defendant said to plaintiff, "You are not going to get that," and plaintiff replied, "If you feel that way about it I will have to take it up with the union," and defendant then said, "Go on, take it up with the union; I will go and get a warrant for you and railroad you."

Finding no reversible error in the record, the judgment of the Municipal court is affirmed.

AFFIRMED.

Daver and McSurely, JJ., concur.





410 - 26884.

CITY OF CHICAGO,

Appellee.

vs.

JOHN WALY,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

221 I.A. 647

MR. PRESIDING JUSTICE HOLDOM  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a fine of \$100 under a charge of aiding, countenancing and assisting in making improper noises, etc., tending to a breach of the peace in violation of a city ordinance regarding disorderly conduct.

The evidence fails to establish the charge. The facts are that defendant in a flat which he owned had a tenant named Kramer, which flat Kramer agreed to vacate by the 15th of May, 1920; that Kramer and Olga Kramer, his wife, did vacate the flat the day previous and delivered the key to defendant; that the household goods were packed ready to be shipped and Mrs. Kramer claimed the right to leave the goods in the flat in virtue of an agreement she claimed to have with the incoming tenant. As the new tenant desired possession of the flat, defendant had the goods of Kramer moved to a warehouse and gave to Mrs. Kramer the warehouse receipt for them. There was no loud talking or disturbance attendant upon this transaction. There were present, at the time the furniture was moved, two



police men, but no arrests were made and not until afterwards was the warrant in this case sworn out.

There is nothing in this record justifying the conviction and fine imposed; therefore the judgment of the Municipal court is reversed.

REVERSED.

Lever and McCarely, JJ., concur.

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432 - 26606

ELLEN BURTAUGH,  
Appellee.

vs.

THE NATIONAL COUNCIL OF THE  
KNIGHTS AND LADIES OF SECURITY,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 648

MR. PRESIDING JUSTICE HOLCOMB

DELIVERED THE OPINION OF THE COURT.

This is an action upon a benefit certificate in the defendant order upon the life of Matt Burtaugh, in which plaintiff is the beneficiary in the sum of \$2,000.

Upon a trial before court and jury there was a verdict and judgment for \$2181.73, and defendant brings the record to this court for review and asks a reversal upon the following grounds, viz: That the trial court erred in its rulings upon the evidence and its instructions to the jury and in not instructing a verdict for defendant.

The decisive question in this case is, did the insured obtain his membership certificate in the defendant order by falsely representing in his application that he was a cigar dealer, when he was in fact a saloon keeper, which if true disqualified him for membership.

In his application for membership, the insured after stating his name and residence, answered question 6 - "What is your business or occupation?" - by "Cigar dealer." And to the question, "Have you any other business, employment or occupation, either regularly or occasionally?" he answered "No." Under clause 7 in his application he made the following statement: "I am not engaged in any of the occupations mentioned in Sections 106 and



107 of the laws of the order printed on the reverse side hereof, except as stated in answer to question 6, and I agree that I will not while a member of this order, hereafter engage in any of these occupations, except at the same time recognizing the full force of the order's laws extinguishing its liability upon the contingency of any member engaging in any prohibited occupation or increasing the rate of assessments on account of engaging in a hazardous occupation.

I hereby make application for beneficiary certificate from the National Council of the Knights and Ladies of Security, and I hereby declare that the foregoing answers and statements and the answers to the questions propounded to me by the medical examiner, are warranted to be true and full, and I hereby acknowledge and agree that the said answers and statements with this application shall form the basis of my agreement with the order and constitute a warranty. I hereby make my medical examination a part of this application and agree that this application and medical examination shall be considered a part of my beneficiary certificate.

I further declare and agree that I know and understand the contents hereof, and that the answers and statements as written herein are as given by me to the medical examiner."

Section 107 on the reverse of the application above referred to, reads:

"The following are the prohibited class of risks, and no subordinate council shall receive into or retain in its beneficiary membership persons engaged in any of the following occupations: \*\*\* persons engaged either as manufacturer of, or wholesale dealer in, spirituous, malt, or vinous liquors, or as saloon owner, saloon keeper, or bartender, engaged in the sale of spirituous, malt or vinous liquors as a beverage."

There are other sections providing in substance that false statements made shall invalidate the membership and the beneficiary certificate issued thereunder.





There can be no doubt that the statement as to the insured's business was false, and that instead of being a cigar dealer he was a saloon keeper, because it is stipulated by counsel that Murtough was the owner and keeper of a saloon at the time of the application and thereafter until the time of his death. Notwithstanding this, plaintiff made an affidavit in support of the proof of death, swearing that the insured, the deceased member, was not at the time of making application for membership or at any time thereafter engaged in the business or occupation of a wholesale or retail dealer in liquors, and at no time performed any of the duties of such business, that his last business was that of meat inspector for the Anglo-American Company, and that it was the same when he joined the order; that the occupations he had followed for the last ten years were "laborer," "packing," "meat inspector" and "cigar dealer." In view of the foregoing stipulation it is patent that the statements in plaintiff's affidavit were untrue.

It seems that one Dr. Isabella Hurson examined the insured for the society. A Mrs. Julia A. Brady solicited the deceased to make the application and to become a member of the society. Plaintiff in her testimony described the flat over the saloon where the Murtoughs lived, and stated that the number was over the transom of the saloon door; that there were two doors in front, one leading into the saloon and one going into the hall leading to the upstairs flat; that there was a sign of the Mc-Avey Brewing Company and the name "Matt Murtough" over the saloon door; that while Mrs. Brady was in the flat the insured came up and had luncheon with them; that a couple of days later in the evening Mrs. Brady came back with Dr. Hurson, staying there about two hours, and that she called her husband up into the flat; that she thereupon told Mrs. Brady and Dr. Hurson that her husband could not go to the lodge to be initiated as there would be no one to





take care of the saloon, but they said they would initiate him there; that she and her husband were both examined and both initiated into the defendant order in the flat that night; that she heard the questions asked and that her husband said that he was a saloon keeper; that Dr. Hurson asked him if he sold anything besides liquor, and he said he sold cigars and tobacco, and that Mrs. Brady said, "We will put him down as a cigar dealer;" that during the examination and initiation her husband wore no vest and had on a white apron; that the money for assessments was sent to Harry Amey, the financier of the local lodge; that the certificate sued upon was received by mail.

A servant of plaintiff was present and corroborated the substance of the foregoing testimony of plaintiff. He swore that she heard Mrs. Brady and Dr. Hurson say that they would put Murtaugh down as a cigar dealer, that it would not look well to put him down as a "saloon keeper."

Another witness testified that he told Mrs. Brady to get Murtaugh's application, that he gave Mrs. Brady Murtaugh's address and told her it was a saloon and that at that time he did not know that saloon keepers were not admitted into the order, and did not know this until after Murtaugh's death. He then looked into the bylaws and discovered for the first time that saloon keepers were not eligible.

The contract between the insured and the defendant society is embraced within the application, the beneficiary certificate issued on such application, and the constitution and bylaws of the defendant society, and they are to be construed together as the contract of the parties thereto. This is the law as well settled in this State by numerous authorities. Wright v. National Council K. & L. of B., 255 Ill. 460; Cross v. Supreme Lodge K. & L. of B., 254 *ibid* 80; Love v. M. F. A., 259 *ibid* 102;



Hervick v. N.W. A., 158 Ill. App. 570.

Whether the answers were representations or warranties, they would, if false in fact, vitiate the contract. Lewis v. Naval League, 215 Ill. App. 212.

The occupation of Burtaugh was material to the risk of insuring his life, and his statement that he was a cigar dealer when he was in fact a saloon keeper being false, there can be no recovery.

According to the testimony of plaintiff there was collusion between Dr. Isabelle Harsen, the medical examiner, and Julia Brady, who procured the application, to intentionally deceive the defendant society on the material question of the occupation of Burtaugh, by falsely representing that he was a cigar dealer when he was in fact, to their knowledge, engaged in the saloon business, which disqualified him under the constitution and by-laws of defendant society from membership therein. None of the parties to such an illegal act can, in a court of justice, obtain any advantage by such false representations.

If it were conceded that Mrs. Brady was the agent of the defendant society in procuring Burtaugh's application, the collusion between the applicant and such agent to procure a membership certificate by false statements would not bind the defendant. McGreavy v. National Union, 152 Ill. App. 62.

There is nothing in the evidence to bring home to defendant knowledge of the false statement in the application as to the occupation of Burtaugh either at the time the certificate of membership was issued, or at any time thereafter preceding Burtaugh's death. Furthermore, defendant cannot be held to have waived its right to forfeit the membership because of the fact that such false statement was collusively made and procured by an agent of defendant. Before a waiver can be fastened upon defendant it is incumbent upon plaintiff to prove by a preponderance of the evidence that the agent had express authority from the defend-

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ent to make the waiver, or that defendant subsequently had knowledge of the facts and ratified the action of the agent in making the waiver. No waiver can be inferred from the collusive action of the insured and the agent of defendant in making false statements in regard to a material matter, made for the purpose of avoiding the express provisions in the constitution and by-laws of defendant society. Brown v. Great Camp, 167 Mich. 193.

There is no evidence that Mrs. Brady, who solicited Parttugh to join the society, was acting as the agent of the defendant or that she had any contract, understanding or agreement of agency with defendant. On the contrary it was shown that she was working for the district manager of defendant, whose duties and powers were not disclosed.

Conversations between plaintiff and the insured with Mrs. Brady were inadmissible for two reasons: First, she was not proven to be the agent of defendant; second, she was dead. Section 5521, chap. 5, J. & A. Ann. Stat.

Plaintiff was permitted to testify as to conversations between herself, her husband, the insured, and Mrs. Brady and Mr. Larsen. This testimony was inadmissible under the statute ~~above~~ and under the ruling in Mallstedt v. Ideal Lighting Co., 271 Ill. 154.

As the errors committed by the court as above pointed out were ones of law and not of fact, we are not permitted to reverse with a finding of fact; but for those errors the judgment of the Municipal court is reversed and the cause remanded for a new trial in accord with the legal principles above laid down.

REVERSED AND REMANDED.

Weyer and McDurely, JJ., concur.



441 - 26615

CHARLES P. CGREN,  
Appellee.

vs.

JACOB LEVY,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 648

MR. PRESIDING JUSTICE HOLDOM  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon the verdict of a jury in an action of forcible detainer for the first flat, 810 Eastwood avenue, Chicago, occupied by defendant under a lease from plaintiff, of which judgment defendant seeks a reversal on this appeal.

The lease expired by its terms on April 30, 1920. It contained the following clause on a typewritten rider, viz:

"If said lessee does not give said lessor written notice, 60 days prior to the expiration of this lease of his intention to vacate said premises at the expiration of the term hereby granted, the failure to give such notice shall operate as a renewal of the tenancy for the further period of one year at the option of the lessor."

It will be observed that the sixty day notice was to be given by the lessee and not by the lessor. However, plaintiff put his own construction on this clause in the lease by giving sixty days notice to terminate the lease on the day of its expiration. This notice was given February 13, 1920, more than sixty days prior to April 30th.

Defendant objects that neither the notice nor the complaint nor the verdict and judgment is for the premises occupied by him under his lease from plaintiff, because in

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the lease the flat is described as being the "first flat, 808 Westwood avenue, Chicago," while the complaint and the verdict and judgment are for the "first flat, 810 Westwood avenue."

It appears without contradiction that the flat in the lease was one of twenty-one flats in a building numbered 808-810 Westwood avenue, and that there was a common entrance to all the flats in the building which was in the center of the building, the flats being on each side of such entrance. Under these circumstances it is our opinion that the notice, the complaint, the verdict and the judgment are sufficiently definite to locate the flat occupied by defendant in plaintiff's building on Westwood avenue; therefore such objection is without merit.

Furthermore, defendant admits that the lease was to terminate on the day of its expiration by its terms, but sets up a new agreement made verbally, so he claims, with plaintiff when he met him upon the street, by which the term of his lease was to be extended six months. This alleged agreement plaintiff denies. Whatever may be said regarding an attempt to extend by parol a lease under seal, as is the one in controversy, such defense if available was an affirmative one and must be proven by a preponderance of the evidence. This quantum of proof on this point defendant failed to furnish.

There is no merit in the defense. Plaintiff in insisting upon possession after the termination of the term of the lease was within his legal rights.

There is no error in this record warranting a reversal of the judgment of the Municipal court, and it is therefore affirmed.

**AFFIRMED.**

Dever and McCarely, JJ., concur.





455 - 26629

MUTUAL BROKERS Ltd., a  
Corporation, for use of  
W. A. WHITE,

Appellant,

vs.

M. FIORETTI & SONS,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 648

MR. PRESIDING JUSTICE MOLDON

DELIVERED THE OPINION OF THE COURT.

On a trial before the court there was a finding and judgment for one cent and plaintiff appeals.

Since the filing of plaintiff's briefs the bill of exceptions has been stricken from the files on motion of defendant.

There is no assignment of error which can be considered on this review without a bill of exceptions. No error is apparent upon the statutory record. In this condition of the record we have no alternative but to affirm the judgment of the Municipal court, which is accordingly done.

AFFIRMED.

Dever and McGuirely, JJ., concur.



203 - 26376

SYBIL TUCKER, Administratrix  
of the Estate of Harry G.  
Tucker, Deceased,

Appellant,

vs.

CARL MUELLER,

Appellee.

1678a)  
APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

221 P.A. 648

MR. PRESIDING JUSTICE DEVER  
DELIVERED THE OPINION OF THE COURT.

Since the filing of the opinion in above cause our attention has been directed by motion to the fact that the cause having been tried by the court without a jury, this court is empowered under Section 110, chapter 110, Practice Act, to enter a final judgment here in favor of plaintiff. Therefore, the judgment heretofore entered on June 13, 1921, is hereby vacated and set aside and judgment is entered in favor of plaintiff for the sum of \$2890.37 with costs here and in the trial court in favor of plaintiff, and the opinion hereinbefore filed is modified accordingly.

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211 - 26384

CAROLINE C. MATTES,  
Appellee,

vs.

MERCHANTS RESERVE LIFE  
INSURANCE COMPANY, a  
Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 648

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court entered in favor of the plaintiff and against the defendant.

In the Municipal court the plaintiff sought to recover a judgment on two insurance policies in the defendant company for the sum of \$2000 each. These policies were known at the trial as #4 and #1370 respectively. At the conclusion of all the evidence the court, on motion of the defendant, excluded all evidence relating to policy #4 and directed a verdict on policy #1370 in favor of the plaintiff. Only the action of the court in entering a judgment on the latter policy is questioned here. The evidence shows that the application for the insurance provided by policy #1370 contained a stipulation as follows:

\*\*\* If at any time hereafter I shall engage in the military or naval service in time of war, without the written consent of the company, the policy hereby applied for shall thereupon become null and void."

It was stipulated on the trial that the insured at the time the policies were issued was a commissioned officer in the National Guard of Illinois; that about the 12th of August, 1917, he arrived with a detail of his regiment at Camp Logan, near Houston, Texas, and thereafter on August 23, 1917, and while in the performance of his duty as such commissioned officer, he

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met his death while attempting to quell a riot.

It is conceded that all of the premiums due on the said policy had been paid to the extent that the policy was continued in force until October 1, 1917. The by-laws of the defendant company provide that its policies shall become null and void if a member engage in military or naval service in time of war. At the time the insured met his death this country was at war with the Imperial German Government. Plaintiff's position on the trial and here is that the defendant waived the provision of the by-laws and the application above quoted.

It is also insisted for the plaintiff that the clause against military service was and is void as against public policy; that it does not apply where the entry into the military service was involuntary; that the insured's death was caused by hazard common to both military and civil life and did not occur by reason of his military service.

It appears from the evidence that the death of insured was caused while he was actively engaged in military service for the United States Government. The clause in question was inserted in the policy by the insurer for its benefit, and should therefore be construed more strictly against it.

The case of Kelly v. Fidelity Mutual Life Ins. Co., 169 Wis. 274, is in some respects like the present case. In that case the Supreme court said:

"We think it is clear that the language was used for the purpose of limiting the liability to the return of the premiums in cases where death resulted directly or indirectly from some cause peculiar to the military service and one not common to military service and civilian life. The deceased came to his death by reason of an accident while riding a motor cycle under circumstances which were not in any way peculiar to the military service."

The stipulation shows that the insured met his death while he was attempting to suppress a riot engaged in between mutinous colored troops and white civilians. While deceased's





action was, we assume, in some way connected with his military service, it cannot be said that it was a necessary result thereof. He appears to have met his death while in the performance of police duty in quelling a civic riot. It is not asserted that the death of deceased was brought about by a cause necessarily the result of his being drafted into the federal military service, nor was it caused by the war then pending between the United States Government and the Imperial German Government. The incidents which led to the death of the insured, that is, the riot between mutinous troops and civilians, were in no sense, so far as the stipulation shows, inseparably connected with the fact that this nation was at war with Germany.

The case of Redd v. American Central Life Ins. Co., 200 Mo. App. 383, is essentially similar to the present case. The only substantial difference being that in that case the application for the policy contained a clause which provided that active service in the army or navy without the written consent of the company would invalidate the policy in part. The insured died while in service at Camp Funston, Kansas. In deciding the case the court said:

"The kind of active service that we are dealing with is, according to the policy, service 'in time of war.' Is one who has entered a military training camp and is there in the course of training in the medical department of the army, thousands of miles from the scene of hostilities, to be regarded as in active service in the army in time of war? We think not. Such a person is certainly not 'before an enemy in time of war' or engaged in 'operations carried on in his presence,' nor is he in 'the performance of duty against an enemy.'"

"The policy provides that in order that defendant may not be liable for the full value of the policy, death must be from service in war. This provision taken in connection with that in the application shows that the application and policy mean that the service mentioned was to be in operations by which war is carried on before the enemy; that is, the service one renders when engaged or assisting in actual hostilities."

Clearly it cannot be held in the present case that deceased came to his death while engaged in a war service, construing



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LIFE OF THE LATE KING OF GREAT BRITAIN  
AND IRELAND CHARLES THE SECOND  
BY JOHN BURNET  
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IN THE UNIVERSITY OF OXFORD  
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the clause in question more strictly against the insurer. Phoenix Insurance Co. v. Grove, 215 Ill. 299.

It does not seem reasonable to hold that the clause was intended to protect the defendant company from loss due to hazards ordinarily disconnected with war service. The stipulation shows that the officers and directors of the defendant company had full knowledge of deceased's connection with the National Guard of Illinois. The clause in question does not provide for rendering a policy null and void merely because an insured may become engaged in military service, but it expressly provides that such result is not to be brought about unless the insured becomes so engaged in time of war.

It is our opinion that in a case where it is shown that the insured with full knowledge on the part of the defendant was at the time the policy was issued and for a considerable time thereafter engaged in military service, the clause should be held to mean that the death, before action on the policy could be defeated, should be shown to have been brought about in some manner as a result of an existing war. An act of Congress approved June 3, 1916, known as the National Defense Act, provides for placing the National Guard troops under federal, as well as state control. Under this act the insured took oath in November, 1916, to "well and faithfully discharge the duties of the office in the National Guard of the United States and of the State of Illinois."

Mr. Saunders, a witness for plaintiff, was at this time a director and secretary of the defendant company, and his testimony discloses that he knew the defendant for twenty years or more; that both he, the witness, and Mr. Pierce, who during 1916 and 1917 was a director and treasurer of the defendant company, were well aware of deceased's connection with the military service; and this same witness, Mr. Saunders, testified as to facts



from which it would not be unreasonable to conclude that this knowledge was known to the witness and to Mr. Pierce after insured had been drafted into the service of the Federal government in July, 1917.

On the whole record we think the judgment ought to be affirmed. The decided cases are not quite clear as to what acts or knowledge constitute a waiver of a provision which requires consent in writing before an insured may become connected with military service in time of war. Phoenix Insurance Company v. Grove, 215 Ill. 299. We prefer, however, to rest our decision upon our belief that the clause under consideration was drafted by the defendant company for its own benefit and that when applied to the facts of the present case in view of the admitted knowledge on the part of defendant's officers, it should be held that it was intended thereby to protect defendant from loss in the event of insured's death arising out of circumstances connected with the carrying on of war; that deceased's death is not shown by the stipulation or otherwise to have been caused by any act or fact necessarily connected with the world war, and that it is not shown by the record that his death was not the result of accidental causes existing independent of his employment in the service of the United States. Malone v. State Life Ins. Co., 202 Mo. App. 499.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

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TIMOTHY D. HURLEY,  
Appellee,

vs.

WOMEN'S ASSOCIATION OF COMMERCE,  
a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 649

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Timothy D. Hurley, plaintiff, procured a judgment in the Municipal court of Chicago against the defendant corporation for services on a claim for attorney's fees/alleged to have been rendered by him under the terms of a contract. The defendant by this appeal seeks to reverse the judgment.

In an amended statement of claim it is alleged that the plaintiff had rendered a statement of account on July 31, 1918, to the defendant; that defendant had paid \$50 on account thereof, leaving a balance due plaintiff of \$300. The case was tried before a jury, which rendered a verdict in favor of the plaintiff for the sum of \$300. Judgment was entered on the verdict.

The evidence shows that the plaintiff by express agreement with the defendant agreed to render services in two suits in each of which defendant was a party. One of these suits was pending in the Circuit court of Cook county, the other in the Superior court of Cook County; both suits were dismissed by agreement of the parties thereto in May, 1919.

There is no dispute that plaintiff performed some service for defendant in the suits before their dismissal. July 8, 1919, plaintiff submitted to defendant a statement for legal services rendered which showed a balance due him of \$330, and he rendered a subsequent similar statement to it on July 31, 1919. Thereafter on August 28, 1919, and after some correspondence be-



tween the parties, in which the defendant sought to excuse the delay in making payment of the amount shown to be due by the statements, the defendant mailed a check to the plaintiff for \$50.00 and also a letter containing the following statement: "Enclosed find check for \$50.00. More would be sent you but we are short of funds." September 16, 1919, plaintiff rendered a statement to defendant, giving it credit for the payment of \$50.00, and showing a balance due him of \$300. Some correspondence took place between the parties between the date of the rendering of this statement and the bringing of the suit on November 25, 1919, but nothing is shown thereby except that failure to make payment to plaintiff was due to the fact that defendant was short of funds.

The amended affidavit filed on behalf of the defendant sets up that there was an agreement to pay plaintiff the sum of \$300 for carrying on one of the suits referred to "to a conclusion," and it was charged in the affidavit that "plaintiff did not carry the said cause to a conclusion, but only attended one hearing before the master in chancery to whom said cause had been referred, on the 12th day of May, 1919, and has not since taken any steps in regard to said cause, and was therefore, on November 25, 1919, discharged by the defendant as its attorney."

The evidence shows that the defendant was complainant in the two suits which were filed to enjoin certain persons from encroaching upon charter rights of defendant. Plaintiff was engaged to aid other counsel in the cases. Both suits were referred to masters in chancery of the respective courts where hearings were had, which were attended by plaintiff on behalf of defendant. While the hearings before the masters were pending the defendant, by a resolution, agreed to a dismissal of the suits.

The evidence shows that a statement of account had





been rendered defendant by plaintiff and that it had not only failed to make any objection thereto, but had in fact paid \$50 thereon, accompanied by a statement that defendant was unable to pay a larger amount because of lack of funds. No evidence was introduced or tendered on behalf of defendant which tended to prove that the plaintiff had been guilty of any fraud or misrepresentations, either in the making of the contract or in the rendering of the statement of account.

A defendant will be permitted to show, notwithstanding a promise made by him to pay a balance due on account stated, that at the time the promise was made he had not discovered or had been informed of errors in the statement of account. Schnell v. Ecklernitzburg, 82 Ill. 439. But, as we view the record in this case, there was no tender of evidence tending to show that at the time the defendant received the several statements of account, and had made a payment thereon, it was unaware of any fact or circumstance which could have been offered as a defense in the suit. It is true, as urged, that in cases like the present, between attorney and client, the law will insist that the attorney deal fairly with his client and the courts will readily admit any proper evidence which tends to show that the client has been imposed upon; hence the ruling in Robinson v. LeMayne, general number 26031 in this court, opinion filed October 11, 1920. (not yet reported), and in Graby v. Smith, 13 Ill. App. 43, that in a suit between an attorney and client the client will be permitted to show, even where he has agreed to pay an exorbitant bill, that the promise to do so was given as the result of error or mistake, or that the attorney has in some manner overreached him. The decisions in these cases are based upon the principle that even where an action is brought upon an account stated, an attorney will not be permitted to unfairly use any power or in-





fluence which he may acquire by reason of the confidential relationship between him and his client.

We will of course concede, as urged, that the defendant was entitled to have any proper evidence in its possession introduced for the consideration of the jury. The difficulty however seems to be that neither in the affidavit of merits nor in the offer of proof was anything tendered which would authorize the jury to render a verdict against the plaintiff. No evidence was offered that the plaintiff had failed to perform services for the defendant in accordance with the contract. \* It is gathered from the brief filed on behalf of the defendant that complaint is made that the plaintiff did not properly and efficiently perform the services required of him. As stated above, plaintiff was employed to render professional services in the two suits, and no fact is indicated in the brief which tends to show that the plaintiff did not render all the services required of him under the contract up to the time when the defendant, by resolution, had agreed to dismiss both of the pending suits. The record does disclose that one of the suits in question was dismissed by the court on its own motion, and that an execution for costs incurred therein was issued, and that this execution was subsequently quashed by the court. It is asserted that this execution was wrongfully issued and that the plaintiff did not attend court on the day that the order quashing the execution was entered. On this point plaintiff testified that he attended court on two separate occasions in connection with this action and that the associate counsel whom he was employed to assist in the case had not kept him informed as to when the motion was to be set for hearing. It should be borne in mind that the plaintiff was specially employed to assist other counsel in the case. If the defendant was of the opinion

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that the plaintiff had rendered a statement of account and that its promise made thereafter to pay the same was made inadvertently and as the result of any fraud, mistake, or error on the part of plaintiff, and that he had taken undue advantage of his relationship to defendant, it should have stood ready to point out some fact or act susceptible of proof that would have warranted the court in finding in its favor. This we think it failed to do.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holden E. J., and McShorely, J., concur.





298 - 26472

A. DOOLITTLE, Appellee,

vs.

MADAME ISS' BELL'S TOILET  
MFG. CO., a corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

221 I.A. 649

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior Court of Cook County and obtained a judgment therein for the sum of \$1,692.40. Defendant appeals.

The suit was brought on a written contract under which the plaintiff was employed at a stated salary and in addition thereto 1% on the gross sales of the defendant company in excess of \$50,000 per year, to be paid in stock of the company. The contract, which was dated July 20, 1914, was to continue for a period of two years and was to be renewed for a like period on failure of either party to give notice of an intention to terminate it. The evidence shows that plaintiff was employed by defendant under the contract for three years and seven months. No claim is made as to the last, or fourth, year of the contract. It is urged that the defendant has refused, though often requested, to deliver stock, as agreed by it under the contract. The excess sales of the company above \$50,000 per each year of the three years during which plaintiff was employed under the contract, amount to a total of \$159,249.70, one per cent of this amount is \$1,692.40, and the jury assessed plaintiff's damages at this latter sum; thereby, in effect, finding that the stock of the company was worth \$100 per share.

The evidence discloses without much question that during three years the plaintiff had performed all that was



required of him under the terms of the contract, and there is evidence in the record which warrants the conclusion that although often requested to do so, and although the sales of the defendant had been for considerable sums above \$50,000 each year, no real effort was ever made to render a statement of account to the plaintiff or to turn over to him stock of the company which the evidence shows he was entitled to under the terms of the contract.

On the question of the value of the stock the evidence is not by any means, as asserted, all one way. The plaintiff testified that Mr. Gentry, president of defendant company, when appealed to by plaintiff for a statement of account, replied that the stock was worth more than par and that he, Gentry, would buy the stock back or pay the commission in cash.

There is ample evidence in the record to show that plaintiff had performed valuable services for the defendant and that it desired to retain him in its employ.

The testimony that the stock was worthless is not uncontradicted in the evidence, as asserted. Aside from statements of Gentry to plaintiff, there is evidence tending to show that the defendant had submitted financial statements to a bank from which it was not unreasonable to conclude that the stock was actually worth \$100 a share. The trial judge did not err in admitting these statements in evidence; they tended to prove that the defendant company was operating at a profit and that its assets were much greater than its liabilities.

There is no merit in the contention that the plaintiff was not entitled to recover for the services rendered by him during the third year of the contract. The evidence shows that after plaintiff had faithfully performed services required of him under the contract for a period of three years and seven months he was unable to obtain from the defendant any statement





of its gross sales. Under the circumstances shown by the evidence, plaintiff was not required to complete the second two year term of the contract. The jury was justified in the belief that the defendant had breached the contract, and if it did so, plaintiff was not required to continue to perform his promises under the contract. It is urged that the contract, being entire, that plaintiff, before he can recover thereunder, must show a full and substantial performance by him. Undoubtedly this is the general rule. American Publishing House v. Wilson, 53 Ill. App., 413; but this rule does not apply to a case where the evidence shows that the other party to the contract has committed a breach thereof, and where, as in the present case, it fairly appears that no genuine attempt was made to pay for services rendered under the contract.

In the case of Keeler v. Clifford, 165 Ill., 544, it was held that upon non-payment of an installment due under a construction contract, a party required to perform services thereunder might abandon the contract. The claim made in the present case is for services actually rendered. Tait v. Tinsman, 138 Ill. App., 76.

Other questions are raised by the brief of counsel as to which we think no reversible error was committed during the trial of the cause. On the evidence in the record the jury was fully authorized to find, as it did, for the plaintiff.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Holden, P. J., and McSurely, J., concur.





311 - 26485

JOSEPH URBA,  
Appellee.

vs.

ELIZABETH PLUNGER,  
Appellant.

APPEAL FROM CIRCUIT COURT.

COOK COUNTY.

221 I.A. 649

MR. JUSTICE DEVEN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$250 rendered against her in the Circuit Court of Cook County.

The plaintiff charged in his declaration that the defendant had assaulted him and committed a battery upon him by throwing to and upon him a kettle and pot of dirty water and suds; that the assault was willful and without any justification. The case was tried before a jury which returned a verdict upon which the judgment was entered.

The reason urged for reversal requires in the main a weighing of the evidence introduced upon the trial. No appearance has been filed here on behalf of the plaintiff. We have examined the record, however, and it is our opinion that the issues were properly submitted to the jury and that there is sufficient evidence to authorize the verdict returned by it.

The evidence introduced for the plaintiff, if true, discloses that he was peaceably passing out from premises owned by defendant when she committed the alleged assault upon him. This evidence tends to prove that at the time the assault was committed the plaintiff was not trespassing upon the property of defendant.

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U.S. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, WASHINGTON, D.C. 20540

THE UNIVERSITY OF CHICAGO

*(Faint, illegible text)*

20. 1994, morning at island near shore, 1000 ft. depth.

Just now, technology and computers are different and make you

The defendant in testifying denied that she had committed any assault upon plaintiff although she seeks by her testimony to give the impression that she had objected to the presence of the plaintiff on the premises, and that she had cautioned him to cease his visits to one of her tenants.

It will serve no purpose to discuss the evidence as shown by the abstract of record. It is sufficient to say that it is our opinion that the record contains evidence in support of plaintiff's contention that the assault upon him was unprovoked and without justification.

In view of the evidence, we are unable to say that the court erred in giving an instruction which told the jury that exemplary damages might be awarded the defendant if the jury believed from the evidence that a trespass was committed by defendant, as charged in the declaration, in a wanton, willful and insulting manner.

The claim made on behalf of the defendant to the effect that the assault made upon plaintiff was the consequence of a continuous/<sup>provocation</sup> on the part of the plaintiff does not find strong support in the evidence.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

Holden, P. J., and McSurely, J., concur.



The defendant is testifying that she had  
committed any homicide upon plaintiff's death and would be  
her testimony is also the testimony that she had witness  
to the presence of the defendant on the premises, and that  
she had witnessed him in some his visit, in one of his

It will come to witness to witness the evidence  
in many of the evidence of witness. It is entitled to say  
that it is her opinion that the record evidence witness is  
support of plaintiff's contention that the witness upon who  
was suggested and without justification.

In view of the evidence, we are unable to say that  
the court erred in giving an instruction which said that  
that testimony suggests might be awarded the defendant if the  
jury believed from the evidence that a trespass was committed  
by defendant, he should be the defendant, in a matter.

affirmative and justified answer.  
The state does not deny the evidence in this  
affair that the witness made upon plaintiff's death and testimony  
provocation  
of a conflict was on the part of the plaintiff from and from  
strong support in the evidence.

The judgment of the Circuit Court will be  
affirmed.

affirmed.

affirmed. U. S. v. ...



340 - 26514

JOHN H. SCHLUTER, HIPOLYT  
J. SCHLUTER and PETER A.  
OLSON, copartners, operating  
as SCHLUTER & SONS,

Appellants,

vs.

FRED C. HESS,

Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 649

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in the Municipal Court of Chicago to recover the sum of \$229.20, which includes, as alleged, \$25.00, the value of a sample case, and certain money said to have been furnished to defendant for expenses of an automobile trip to Lincoln, Nebraska.

The defendant alleged that he was induced to enter the employ of plaintiffs as a salesman by reason of fraudulent representations as to the character and extent of plaintiffs' business. Defendant further charged by way of set-off that he was entitled to a judgment against the plaintiffs for an alleged breach of the contract of employment.

It is conceded that the plaintiffs employed defendant upon a commission basis and that in the course of his work he did go to Lincoln, Nebraska. The case was tried by a jury which returned a verdict in favor of the defendant for the sum of \$81.35. Judgment was entered thereon, which the plaintiffs seek to reverse by appeal to this court.

Several reasons are urged why this court should reverse the judgment, but in the main they are centered about a principal proposition that the verdict of the jury is against the weight of the evidence. It may be conceded, as urged, that the burden of proof was upon the defendant to establish his set-off by a preponderance of the evidence. Ellis v.

43-1182

The following is a list of the names of the persons who have been employed by the Government of the District of Columbia, in the capacity of stenographers, during the year 1911, as shown by the records of the Department of the Interior, Bureau of Land Management, Office of the Commissioner of the General Land Office, Washington, D. C.

Cethran, 117 Ill., 458.

The evidence introduced on the trial shows that under the contract defendant was to perform services for the plaintiffs for a period of three months. So far as the plaintiffs' statement of claim is concerned only three items of the account between the parties are questioned, that of the charge for expenses to Lincoln, Nebr., \$25.00 charge for the sample case and an alleged omission on the part of defendant to give plaintiffs credit for 5% commissions. The testimony on the question of the sample case is, to say the least, disputed in the evidence. Touching the matter of the auto trip to Lincoln, Nebraska, defendant testified that the occupants of the car were each to be charged, under an agreement, the sum of \$12.00 for the trip and that this amount had been paid therefor. Plaintiffs insist that defendant was properly indebted for one quarter of the entire cost of the trip.

The defendant testified that he was employed by John A. Schlueter, one of the plaintiffs, who introduced him to a Mr. Moore, plaintiffs' Iowa state manager, who informed him that he, Moore, was earning \$500 to \$600 a month. That later Mr. Schlueter promised defendant that he would furnish him with means of transportation; that he, Schlueter, would furnish defendant with an automobile which defendant could later purchase from the firm on installments. The defendant further testified that the plaintiffs had failed to furnish the automobile as agreed; that he was thereby unable to procure business for plaintiffs and he insists that through delay and in the expenditure of considerable sums of money for transportation and other expenses he was entitled to the set-off claimed by him.

It will serve no purpose to discuss in detail the evidence as shown by the record. In our opinion there was sufficient evidence to warrant the verdict of the jury and the judgment of the trial court in favor of defendant. The parties contradict each other





on almost every fact in issue in the case, and there being evidence in support of the position taken by the defendant the verdict of the jury cannot be set aside. French v. French, 215 Ill., 470; Fatchin v. Crossland, 145 Ill. App., 589.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Holdom, F. J., and McSurely, J., concur.



[illegible]

Received 2011-07-14; revised 2011-08-15; accepted 2011-08-15.

CHARLES W. EVANS,

Appellee,

vs.

BOYDEN SHOE MANUFACTURING  
COMPANY, a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 649

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment rendered against it in favor of the plaintiff for the sum of \$806.19. The case was tried before the court without a jury.

While much evidence in the form of depositions and oral testimony was introduced upon the trial, the record, as we read it, discloses but one principal point of contradiction or controversy between the parties. It is conceded that the plaintiff was employed by the defendant to sell merchandise manufactured by defendant in the territory west of Detroit, Michigan, which included the State of Illinois and the City of Chicago, and that plaintiff was to receive commissions of 6 per cent on the sale price of all merchandise sold by defendant within this territory. Plaintiff's employment under this contract was from July 1, 1914, until February 1, 1919.

It was admitted on the trial that goods manufactured by the defendants were shipped to Anderson & Brothers, Chicago, Ill., and that if plaintiff was entitled to commissions on this sale, then the amount due him would be \$806.19, the amount of the judgment.

The defendant insisted, however, that the contract existing between it and plaintiff was so modified by agreement between the parties as that plaintiff had agreed that he was not entitled to commissions on the sale to Anderson & Brothers. The plaintiff testified that in April, 1919, Mr. Brothers of Anderson & Brothers informed him that Anderson & Brothers anticipated buying



new quarters, about September 1, 1918, but, in that they had no buyer. "Mr. Payne, the buyer of Rogers, Peet & Co., has consented to buy our initial order and is placing his order this week." May 3, 1918, Mr. Slovens, president of defendant, wrote plaintiff to the effect that the goods, for which a commission on the sale is claimed, were not sold to Anderson & Brothers of Chicago, but to Rogers, Peet & Company of New York. In this letter the defendant stated:

"The merchandise is bought by Rogers, Peet & Co., billed to them, paid for by them, and delivered to them in New York. Rogers, Peet Co's style numbers are used, and all of Rogers Peet Co's details. It is, in fact, a Rogers Peet Co. proposition, and in view of these conditions, I will handle the account from here."

In reply to this letter the plaintiff wrote Mr.

Slovens in substance that in view of what Mr. Slovens had written, he, plaintiff, would make no claim for commissions on the sale to Anderson & Brothers.

It appears from the record that the merchandise was not in fact shipped to Rogers, Peet & Company at New York, but was shipped directly to Anderson & Brothers at Chicago. The plaintiff now urges that he was induced by misrepresentations contained in the letter to assent to forego his right to commissions on this sale.

We have examined the evidence introduced on the trial as it appears in the abstract of record, and we are of the opinion that the finding and judgment of the trial Judge finds support therein.

A Mr. Brundage, treasurer of Rogers, Peet & Company, testified that orders were placed with the defendant by Mr. Payne for Rogers, Peet & Company, "to be shipped and billed to Anderson & Brothers, and duplicate bills to Rogers, Peet & Company, the account being guaranteed by Rogers, Peet & Company."

Mr. Fleuchaus, treasurer of the defendant company,

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all derived from a common ancestor. The author also discusses the possibility of life being created by a divine power, and shows that this is a very unlikely possibility.

The second part of the paper is devoted to a detailed discussion of the theory of spontaneous generation. The author shows that this theory is based on the fact that life is a complex of many different parts, and that these parts are all derived from a common ancestor. The author also discusses the possibility of life being created by a divine power, and shows that this is a very unlikely possibility. The author then discusses the various theories of the origin of life, and shows that the most plausible is the theory of spontaneous generation.

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testified that payment for the goods shipped to Anderson & Brothers was guaranteed by Rogers, Peet & Company.

On the evidence the court was justified in finding, as it did, that the sale was made to Anderson & Brothers and that Rogers, Peet & Company was a guarantor of the account. The statement in the letter of Mr. Clavens to the plaintiff is that the goods were billed and shipped to Rogers, Peet & Company. The evidence shows that this statement was untrue. The goods were in fact shipped to Anderson & Brothers, and there is evidence in the record which tends to prove that while Rogers, Peet & Company were financially backing Anderson & Brothers, the sale of the merchandise was in fact made to the latter.

There is not much merit in the contention that the plaintiff will not be permitted to rescind the agreement, which it is urged was intended as a modification of the original contract. The controversy here is between persons who sustain a fiduciary relation toward each other, and it is shown that the modification of the contract was brought about by a misrepresentation of the defendant company. The law will not permit a wrongdoer to profit by misconduct toward an innocent party. We do not mean to say that Mr. Clavens intentionally misrepresented the facts at the time the plaintiff agreed that the Anderson & Brothers shipment was to be excluded in computing commissions due him. The undisputed fact here, however, is that the plaintiff was misled by the misrepresentation into agreeing to a modification of the contract.

"The rule that an innocent misrepresentation of fact does not furnish ground for avoiding a contract does not apply where there is a special fiduciary or confidential relation between the parties, as between principal and agent," etc.

Corpus Juris, vol. 13, p. 361, sec. 275; Mala Elevator Co. v. Mala.

201 Ill. 131.

The judgment of the trial court is affirmed.

Heldes, F.J., and McGuire, J., concur.

APPROVED



THOMAS P. WALPIN COMPANY,  
a Corporation,  
Appellee,

vs.

H. I. HARRIS and J. A. ROGERS,  
Copartners Doing Business Under  
the Name of Harris and Rogers,  
Appellants,

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 650

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The present suit as originally begun was a replevin action in which the plaintiff declared in trover for the value of an automobile which it alleges was wrongfully detained by defendants.

Evidence introduced on the trial discloses that Thomas P. Walpin, a solicitor and treasurer for plaintiff, left a Buick car with the defendants as part payment for a Mercer car; that the day following the making of the agreement to trade the cars Walpin demanded of defendants a return of the Buick car on the ground that his company, the plaintiff, had refused to ratify the agreement. The defendants refused to return the Buick car and plaintiff thereupon began an action in the Municipal court. The case was tried without a jury. The court found in favor of plaintiff and its damages were assessed at the sum of \$900. The defendants bring the case by appeal to this court.

The abstract of record shows that plaintiff claimed the right to the possession of the Buick automobile described in the writ and also "damages occasioned by the wilful holding and detaining of said automobile by the defendants against the plaintiff." In its affidavit of merits the defendants denied that plaintiff was entitled to the possession of the automobile, or that defendants were "unlawfully withholding the same to the damage to plaintiff as set out in plaintiff's statement of claim."



100 120

(The following is a list of the names of the persons who have been named in the above list.)

1. The first person named is John Doe, who is a resident of New York City. He is a member of the New York State Bar Association and is a practicing lawyer. He is also a member of the New York State Bar Association and is a practicing lawyer.

2. The second person named is Jane Smith, who is a resident of New York City. She is a member of the New York State Bar Association and is a practicing lawyer. She is also a member of the New York State Bar Association and is a practicing lawyer.

3. The third person named is Robert Brown, who is a resident of New York City. He is a member of the New York State Bar Association and is a practicing lawyer. He is also a member of the New York State Bar Association and is a practicing lawyer.



It is insisted on behalf of the defendants that the court erred in admitting evidence as to the value of the car; that the action brought was a first-class action and that the defendants were required, before damages could be assessed against them, to file counts in trover in that it appears from the record that the automobile was not recovered on the writ of replevin. We are unable to determine from the abstract of record whether counts in trover had been filed in the trial court. In the brief filed on behalf of the plaintiff it is charged that the court permitted the filing of "three additional counts after verdict." In the pleadings, insofar as shown by the abstract, the plaintiff did seek a recovery of damages for the alleged wrongful withholding of its automobile. The abstract of record does not disclose that any attempt was made to strike the statement of claim from the files. An attempt was made in the statement of claim to charge the defendants with liability for an unlawful retention of the Buick car, and this charge was met by a denial on the part of the defendants that plaintiff had title to the automobile or that defendants were unlawfully withholding it. It does appear that plaintiff in its statement of claim sought to charge the defendants with wrongfully withholding plaintiff's automobile, and however informally this claim was alleged therein, the record does not disclose that defendants made any objection thereto, but on the contrary it met the allegation of damages by a direct and positive denial. Under these circumstances and with the record in this state, the defendants will not be permitted to question the sufficiency of the statement of claim.

In the case of New Columbus Huggy Company v. Empire Express Storage & Van Company, 192 Ill. App. 421, a point was made that in an action for damages for wrongfully withholding automobiles a recovery could not be had where a declaration had





not been filed in the suit, and it was held that the Municipal court had power to adopt rules prescribing the same practice in first-class as in fourth-class cases. In deciding the case the court said:

"Its rules are not before us but, indulging the presumption of regularity of procedure and that the court may observe its rules, we should assume until the contrary is shown that they authorized prosecution of the suit without a declaration. This is not in conflict with Gilman v. Chicago Ry. Co., 268 Ill. 305, which expressly stated that the decision had no application to cases arising under section 48 of said act."

The abstract is defective in that the rules of the Municipal court touching the question under consideration are not contained therein. If it be true, as contended, that the present action is one of the first class; that a declaration in trover was not filed in the cause, in violation of the rules of the trial court, then all of these facts should have been disclosed by the abstract of record; otherwise the point made that the action was a suit in replevin only and that damages in trover could not be proved cannot be decided by this court.

There is ample evidence in the record to sustain the findings of the trial Judge, and he was fully warranted from the evidence in concluding that the alleged trade entered into by Helpin for the Mercer car was made without any authority of plaintiff, and, further, that the circumstances attending the execution of the agreement were not as represented by defendants.

There is a direct contradiction in the evidence as to the terms of the agreement, which the trial Judge was in a much better position to determine than are we. Reversible error was not committed on rulings on the evidence offered on the trial. On the whole evidence, we think the judgment of the trial court was correct.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Heldon, P. J., and McGurely, J., concur.

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404 - 26578

JESSE H. COOK,  
Appellee.

vs.

PAUL KORSHAK, doing  
business as Illinois  
Pawners Society,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 650

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff brought a replevin action against defendant, Paul Korshak, doing business as Illinois Pawners Society, to recover a diamond which without her authority was taken from her possession by her son and pawned with the defendant. The defendant on service of the writ refused to give up the diamond contained therein and the action was changed to one in trover.

An examination of the evidence heard upon the trial as it appears in the abstract of record, as also in the record, discloses that the defendant, Korshak, received from plaintiff's son a diamond and that part of the sum paid therefore was deposited by the seller in a bank. \$365 of this sum was recovered by the plaintiff from the bank, and she, in company with her husband and police officers, went to defendant's place of business and tendered this amount to him and demanded of him the ring and diamond. He refused to accept the money or to return the property.

On the trial a judgment for \$1200 was awarded plaintiff and the defendant appeals.

We think this judgment is well sustained by the proof in the case. Some difficulty was incurred at the trial in proving the value of the property which the defendant admits

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[illegible]

AN examination of the evidence heard upon the trial as it appears in the abstract of record, as also in the report, discloses that the defendant, KENNEDY, received from plaintiff a diamond and that part of the said diamond was recovered by the seller in a bank. That of said was recovered by the plaintiff from the bank, and was in custody with her husband and police officers, went to defendant's place of business and landed this money in his own possession of the said and witness. He refused to accept the money as a

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he received. On service of subpoena duces tecum the defendant produced in court a loose diamond, but there is evidence which tends to show that this diamond was not the one taken from the plaintiff. Under the circumstances it would have been impossible for the plaintiff to prove the damages sustained by her through the loss of the diamond, had she been required to produce it in court for examination and valuation by her expert witnesses.

The record kept by the defendant of the transaction with plaintiff's son shows that he purchased for the sum of \$600 a diamond of 2-1/8 carats weight. The testimony tends to show that the diamond taken from plaintiff was a white diamond of this size, while the one produced in court by the defendant was of smaller size and apparently of poorer quality. It was not error to show by comparison the difference in value between the diamond received by him and the one he produced in court.

The evidence shows that the defendant received the diamond and that its value was not over-estimated by the jury. If it is true, as certain testimony tends to show, that he did not produce in court the diamond actually received by him, then he should not be permitted to profit by the technical difficulty caused by his own action.

No error was committed by excluding testimony which tended to prove that the defendant was one member of a partnership. He filed his appearance in the cause as the defendant doing business as Illinois Farmers Society. He took issue upon the statements made in the statement of claim. No plea was filed setting up a partnership or that there had been a misjoinder or non-joinder of parties defendant. In this state of the record the trial court rightly ruled that evidence with relation to the partnership was immaterial, and so also with reference to the point made that the court erred in admitting evidence of a



proposition of settlement.

The evidence heard on the trial is not well abstracted, but by reference to the record and abstract it is clear that certain statements made by Kershak and plaintiff were made in connection with a tender made by the plaintiff of \$365, which she had recovered out of the \$600 paid by defendant to her son.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

Holden, P. J., and McSurely, J., concur.

RECEIVED AT THE OFFICE OF THE SECRETARY OF THE ARMY

THE FOLLOWING REPORT ON THE PROGRESS OF THE WORK OF THE  
COMMISSIONERS OF THE GENERAL LAND OFFICE FOR THE YEAR 1891  
HAS BEEN RECEIVED FROM THE COMMISSIONERS OF THE GENERAL LAND OFFICE  
AND IS HEREBY FORWARDED TO YOU FOR YOUR INFORMATION.  
THE COMMISSIONERS OF THE GENERAL LAND OFFICE HAVE THE HONOR  
TO ACKNOWLEDGE THE RECEIPT OF YOUR LETTER OF THE 14TH INSTANT  
AND TO INFORM YOU THAT THE MATTER REFERRED TO IN THE SAME  
IS NOW UNDER CONSIDERATION.

Yours faithfully,

THE SECRETARY OF THE ARMY

RECEIVED AT THE OFFICE OF THE SECRETARY OF THE ARMY

HELLIE BRECHER, Administratrix  
of the Estate of GUSTAVE A.  
BRECHER, Deceased,  
Appellee,  
vs.  
GEORGE M. TAYLOR, Jr.,  
Appellant.

APPEAL FROM COUNTY COURT OF  
COOK COUNTY.

221 I.A. 650

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Gustave A. Brecher brought suit to recover damages to his automobile caused by a collision between it and defendant's automobile alleged to have been caused by the negligent driving of defendant. Subsequently Gustave A. Brecher died and his administratrix was substituted as plaintiff. Upon trial by a jury defendant was found guilty and plaintiff's damages assessed at \$350. From the judgment entered on this verdict defendant has appealed.

The accident happened at 12:30 a. m. September 8, 1916. The son of plaintiff, Jack Brecher, with three other young people, was driving plaintiff's car north on Sheridan Road in Chicago. Defendant, Taylor, was driving his automobile south on Sheridan Road with three other persons in the car. The jury would have no difficulty in concluding the preponderance of the evidence showed that on the night in question Taylor and his party had been visiting various resorts on the North side and that Taylor had been drinking whisky and beer and that at the time they left one of these places at about 12:15 a. m. he was intoxicated. One of the women riding with him testified that she protested against Taylor driving the car because he appeared to be intoxicated, but he insisted upon driving. Brecher's car was proceeding north on the east or right hand side of Sheridan Road at a speed of about eighteen miles an





hour, while Taylor's car approached it going south. Taylor's car was weaving or zigzagging from one side of the road to the other, and traveling at a rate of speed estimated at from forty to fifty miles an hour. When Brecher saw Taylor's car approaching in this manner he slowed up his car and moved close to the east curb. When Taylor's car was about a block away it turned towards the east side of the street and headed directly towards Brecher's car, continuing its high speed. As Taylor's car was bearing down upon Brecher's car, the latter, in an attempt to avoid being struck, turned his car to the west, and just as he reached about the center of the street Taylor's car also turned to the west, striking the right side of Brecher's car near the front door, causing the collision and damages in question. Testimony of the eye witnesses established the charge that the accident was caused by the recklessness and negligent driving of his automobile by defendant.

Defendant introduced the testimony of a professor of physics who, in answer to hypothetical questions, gave his opinion as to the occurrence, based largely upon the position of both cars after the accident. His testimony is said to be a demonstration that the accident could not have happened as described by the eye witnesses because this would have been contrary to the laws of physics. Even if competent, the weight of his testimony was for the jury to determine, and we cannot say it should have accepted the theory of the expert rather than the statements of those who saw the occurrence.

Defendant here seems to question the amount of damages, but in what particulars is not pointed out. There is a suggestion that some of the items of repairs may have been for injuries to the automobile before or after the accident. It sufficiently appears that before the accident Brecher's car was in



good condition and that the damages which were repaired were caused by the accident.

It is said that it was improperly made to appear that defendant carried accident insurance, and that the insurance company would pay the loss. The witness testifying as to this was called on behalf of defendant, and the fact that defendant was covered by insurance was brought out upon his direct examination. Defendant having adduced this cannot now complain of it.

We see no sufficient reason to reverse the judgment, and it is affirmed.

AFFIRMED.

Holmes, F. J., and Dever, J., concur.





317 - 26491

A. BAIGER & COMPANY, a  
Corporation,

Appellant,

vs.

ILLINOIS SALTING & REFINING  
COMPANY, a Corporation,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 650

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for an alleged breach of a written contract, whereby plaintiff agreed to buy and defendant to sell a certain amount of nitrate of soda, and also for the return of a \$2500 deposit. Defendant filed an affidavit of defense and also a claim of set-off, alleging that plaintiff had breached the contract and that defendant had thereby sustained damages in excess of the amount of the deposit.

Upon trial by jury a verdict favorable to defendant was returned and its damages assessed at \$227.89, which is the excess of damages over the amount of the \$2500 deposit. Plaintiff appeals from the judgment entered on the verdict.

We are of the opinion the result does substantial justice between the parties and that the judgment should not be reversed unless errors occurring upon the trial should be so serious as to compel this. The first writing between the parties touching the agreement for sale and purchase was dated January 22, 1919, providing for the sale by defendant to plaintiff of some two hundred and seventy tons of nitrate of soda, "material to run 95%." \$2500 was to be deposited by the buyer to bind the contract. The crux of the controversy is the quality of the material tendered by defendant, plaintiff claiming that it contained impurities contrary to agreement and defendant denying this.

On the day after the above agreement plaintiff prepared



a memorandum form of contract which it requested defendant to sign for the purpose of having the agreement on one of plaintiff's regular forms. This memorandum contained these words: "Guaranteed 95% sodium nitrate, free from foreign impurities, resin, dirt, sweepings, etc." Plaintiff also presented a letter on the subject containing this clause:

"We further understood that material in question is regular Nitrate of soda, free from dirt, sweepings, and other impurities foreign to this material."

It was established by evidence that before defendant signed this memorandum it wrote and gave plaintiff's representative a letter referring to this request for defendant's signature to the memorandum. This stated that it must be understood their acceptance of this memorandum "in no wise alters the contract of yesterday. As explained to Mr. Wisniewski it is also understood that this nitrate of soda is not absolutely clean, but that we will make it as near clean as possible. You realize we cannot guarantee material that is purchased from the Gov't. With this understanding we have signed up the same which he has handed us."

The evidence shows that the nitrate of soda was in the arsenal at Rock Island, Illinois, in bulk; that shortly after signing the above papers a representative of plaintiff and one from defendant went there and plaintiff's representative noticed strings in the nitrate which came from the burlap bags in which it was originally shipped. Plaintiff complained of this and it was thereupon verbally agreed, after an experiment, that the nitrate should be run through a sieve to screen out such strings, and it was so treated. The following month bills of lading were presented to plaintiff for payment on three cars of the nitrate, but plaintiff refused to pay these although the contract provided for cash payment when such documents were presented. Plaintiff did not complain of the quality of the material but simply said he could





not use it. Subsequently defendant disposed of the material for the highest price obtainable.

The jury was instructed that it was for the court to determine the contract between the parties, and that the court was of the opinion the contract of January 22nd was the only contract. There was no error in this. It is well settled that letters written and delivered at the same time with a contract, concerning the same subject matter may be considered together in arriving at the intention of the parties. Gould v. Magnolia Metal Co., 106 Ill. App. 205; Smith v. Etzelson, 201 Ill. App. 470; Roseleese v. Baker & Co., 122 Ill. App. 611; Kayser v. Ill. Life Ins. Co., 11 Ill. App. 265. The question as to what writings should be considered and which writings constitute the written contract fully expressing the agreement between the parties, is for the court to determine. Telluride Power Transmission Co. v. The Crane Co., 208 Ill. 218; Gettys v. Marsh, 145 Ill. App. 291.

The presentation of the letter of January 23rd by defendant to plaintiff is denied by the representative of plaintiff, but that it was written and presented as above stated is clearly established by the preponderance of the evidence. It is said this involved an issue of fact which should have been submitted to the jury. While this may be true, it does not follow that the action of the court necessitates a reversal. The Appellate court has power to pass upon the facts, which are as above stated. This being proven, and the conclusion of the trial court as to what constituted the contract being right, it would seem unreasonable for us to reverse because a jury, as to one item of fact, might have reached an improper conclusion.

The record does not show that the material proposed to be delivered by defendant contained less than 95 nitrate soda. There was evidence of some impurities, such as revelings from sur-



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lap, but no evidence as to the quantity of this.

Plaintiff filed an affidavit of defense to defendant's claim of recoupment, but did not deny that the material tendered contained 95% nitrate of soda; and this must be taken as equivalent to an admission that the material was of the quality claimed by defendant. Witnesses testified that the material was to be used for fertilizing purposes, and if, as we must assume from the record, the material was 95% nitrate of soda, it would be merchantable for this purpose even if there were present small quantities of foreign matter.

When plaintiff first refused to comply with the terms of the contract relating to payment, it did not base its refusal upon the ground of the quality of the material. A party having based his refusal to comply with his agreement upon one ground cannot be permitted to afterwards amend his hold. The Cary Lyle Sugar Co. v. Pierre Visu Maple Co., 173 Ill. App. 28.

Plaintiff having improperly breached the contract by refusing to accept the material purchased, defendant had the right to re-sell the same to the best advantage and charge plaintiff with the difference between the contract price and the amount realized upon the sale. Harris v. Fibeux, 180 Ill. 627; Gleese v. Mobile Fruit & Trading Co., 112 Ill. App. 321. The resale seems to have been fair and made in good faith so as to realize the highest price. This is what the law requires. Harbling's Sons Co. v. The Lock Stitch Fence Co., 130 Ill. 660.

Defendant was not bound to re-sell at the place of delivery provided by the contract, but may re-sell at any other place where the best available price may be obtained. White Walnut Coal Co. v. Coal Co., 254 Ill. 368.

There is an error in the amount of the verdict. The contract price was  $3\frac{1}{2}$  cents a pound, "less 1%." This 1% was



not considered in arriving at the verdict. Under the evidence the amounts to defendant should have been \$2547.89. Allowing for the \$2500 deposit, the correct amount of the verdict should have been \$47.89, a reduction from the judgment of \$180. If defendant shall within ten days hereafter file a remittitur of \$180, the judgment, thus reduced, will be affirmed; otherwise it will be necessary to reverse and remand. If remittitur is filed, cost to be taxed against appellant.

APPROVED UPON REMITTITUR.

Holden, F. J., and Dever, J., concur.

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ALEX SANDROFF,  
Appellee,

vs.

JACOB MANDELOVITZ and  
MAX MANDELOVITZ, doing  
business as J. Mandelovitz  
& Son,

Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 650

MR. JUSTICE McCORMY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as the endorsee of a promissory note executed by J. Mandelovitz & Son for \$3,814.68, dated June 9, 1919, payable ninety days after date with interest at six per cent per annum. Upon trial, as directed by the court, the jury returned a verdict for plaintiff, assessing his damages at \$3,951.98, and judgment for this amount was entered, from which defendants appeal.

There is virtually no dispute as to the facts. In connection with the purchase of some goods defendants executed and delivered the note in question to one J. Sandrovitx. June 12, three days after its execution, plaintiff received the note from J. Sandrovitx in payment of a loan of \$3,247 and on account of a previous indebtedness for a larger amount. Defendant Max Mandelovitz testified that he had a conversation with plaintiff about the note about two or three days after the note was given; that he told plaintiff he had given J. Sandrovitx the note for some merchandise and that he must "see Jake about the merchandise and see whether he can deliver it."

As this was all the material evidence in the case there was no question of fact to be submitted to the jury and the peremptory instruction of the court was proper.

Plaintiff, by showing that he was the holder of the

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note, made a prima facie case that he was the holder in due course. Sec. 59, Negotiable Instruments act. His testimony also shows he received it for a valuable consideration and thus established that he was a holder in due course as described in Sec. 52 of the Negotiable Instruments Act.

Plaintiff did not take the note with notice of any infirmity in the instrument or defect in the title, even if the conversation referred to took place before the plaintiff acquired the note, which is doubtful. Not only was nothing said which would constitute notice of infirmity or defect, but plaintiff was affirmatively told that the note was given for a consideration, namely, the purchase of merchandise. A subsequent failure of consideration would be no defense to the note in the hands of plaintiff.

It should also be noted that defendants did not plead failure of consideration, but pleaded want of consideration. Their evidence proved consideration and evidence of alleged failure of consideration would not be admissible. Madhug v. Ganu, 19 Ill. 46; Goding v. McArthur Co., 181 Ill. App. 373.

It is difficult to see any ground for questioning the judgment, and it will be affirmed.

Plaintiff contends that this appeal has been taken merely for delay and sake for infliction of the statutory penalty in such cases. We see no reason why the defendants should not have rested with the judgment against them in the Municipal court. We are inclined to hold with plaintiff upon his motion, and the order of this court will therefore be affirmed with statutory damages of an additional ten per cent.

AFFIRMED WITH STATUTORY DAMAGES.

Halden, P. J., and Bever, J., concur.



379 - 26553

UNITED PLUMBING AND HEATING  
COMPANY, a Corporation,  
Appellee,

vs.

GREENWICK COMPANY, a Corporation,  
Appellant.

221 I.A. 651

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 651

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant was indebted for labor and material furnished by plaintiff for the installation of a heating system in defendant's premises and claimed a balance due of \$1956.56. Defendant filed an affidavit of defense, which the trial court construed to be an admission of an indebtedness to the amount of \$1322.95, and judgment was entered for this and the suit ordered to proceed as to the portion of the demand in dispute. From this judgment and order defendant has appealed.

The statement of claim was sufficient to inform defendant of the nature of plaintiff's claim. It stated that the claim was for a balance due under a written proposal to furnish tools and labor at a specified rate. The statement alleged the number of hours of labor furnished and also the amount of merchandise, with the credits on the account. The cases cited by defendant on the necessity of pleading complete performance of a contract as a condition precedent are not applicable to the present case. This is simply an agreement for labor and material to be paid for at a certain rate. It is not the case of an entire contract to be performed for a specified amount.

The sufficiency of the statement does not appear to have been questioned upon the trial, where its alleged insufficiency could have been raised by proper motion. It is too late to question



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The following is a list of the names of the persons who have been admitted to the office of the Secretary of the Board of Education, during the year 1882.

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it for the first time in this court. Bradley v. Western C. & N. Co., 185 Ill. App. 375.

The judgment was proper under section 36 of the Practice act. In arriving at the amount of the judgment the trial court gave defendant credit for all it claimed as payments on account and by way of recoupment for alleged damages and entered judgment for the balance. We do not see how defendant can complain of this. It simply holds for trial the items for which it claims credits, deductions and set offs, if any.

Where the affidavit of defense asserts that the defendant believes he has a good defense to the whole of plaintiff's demand, but in specifying the nature of defense only defends as to certain items, it is proper to enter judgment for the amount not specifically questioned. This is the established practice in the Municipal court. Madison v. Fortune Brag. Brg. Co., 163 Ill. App. 276; Badgers v. Ridgley, 205 Ill. App. 32; Miller v. Thomas, 210 Ill. App. 125. As was said in Lyons v. White, 314 Ill. App. 123, the affidavit of meritorious defense "limits the proofs that can be made under the plea to such facts as are set forth in it."

We are asked by plaintiff to hold that this appeal was prosecuted for delay and to assess a penalty. Although we have no difficulty in holding that defendant's contentions are without merit, yet we are not prepared to say that the appeal was solely for delay. We are inclined to think it was taken in good faith and no penalty will be imposed, but the judgment will be affirmed.

AFFIRMED.

Heldom, F. J., and Dever, J., concur.



401 - 26575

J. McDONNELL,  
Appellant,

vs.

B. WARREN,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 651

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession entered on a note signed by defendant for \$160. Subsequently, on motion, defendant was given leave to plead and defend, the judgment standing as security. Upon trial before a jury a verdict was rendered against plaintiff and judgment entered thereon, from which he appeals.

Plaintiff is in the real estate business in Chicago. Defendant saw one of plaintiff's advertisements in the Chicago papers soliciting persons having real estate to sell to employ him as agent. The advertisement in large letters contained the words "No sale, no charge." In response to this defendant called upon plaintiff and told him he had a flat building on Hamlin avenue for sale at a certain price, and agreed to pay plaintiff \$140 for selling the property. Plaintiff asked defendant to sign a contract. Defendant testifies that the contract was complicated and upon inquiry he was informed by plaintiff that it was merely an authority to plaintiff to make a sale. The latter part of this document was in the form of a promissory note, but this defendant says he did not know and relied upon plaintiff's statement as to what the document was. Subsequently the note was detached and used in the confession of judgment. Plaintiff did not make a sale of the property.

The jury was evidently of the opinion that the circumstances showed no intention on the part of defendant to sign a





note and no reason why he should, and that his signature was obtained by misrepresentation. To see no reason to disagree with the verdict. The instructions of the court fairly presented the issue of fact, and no sufficient reason for reversal is presented to us. The judgment of the Municipal court is therefore affirmed.

AFFIRMED.

Holden, E. J., and Dever, J., concur.



413 - 26587

CARL EDWARD RITTERBY by his  
Next Friend, MALVINA RITTERBY,  
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

221 I.A. 651

MR. JUSTICE McSUGHEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, was injured through the alleged negligence of defendant. Upon suit by his next friend for damages he had a verdict for \$6,000, upon which judgment was entered and from which defendant appeals.

Defendant does not argue the question of liability but asserts that the verdict is so grossly excessive in amount as to require a reversal; we are of the opinion this point is supported by the record.

The accident happened June 11, 1917. Plaintiff, then two and one-half years of age, was carried by a woman caretaker who, while alighting from a street car of defendant, was by its sudden starting thrown from the step to the street. Apparently the woman did not let go of the child until after she had fallen. The woman and child were taken to a nearby drug store, and the druggist testified that the little boy sat in the chair where they had placed him "and looked around sort of scared like." A doctor gave them attention and found that the child had "a slight contusion" on the back of his head. After the child was taken home the doctor further examined him and found nothing worse. There was no vomiting or other focal symptoms; the lump on the back of the head seems to have gradually diminished in size. Subsequently the child was treated for constipation, but the evidence tends very strongly to show that this condition was caused



by improper feeding.

The theory of plaintiff's counsel was that the accident caused an impairment of plaintiff's sanity as evidenced by his behavior, said to be peculiar and abnormal. The case was tried about two years after the accident. As showing abnormality, witnesses testified that after the accident the child had run away from home occasionally; that he sometimes took playthings from other children; at times broke things with a hammer; showed an unwillingness to talk to strangers; also sometimes quarreled with other children, and sometimes made foolish remarks. There was no evidence that this conduct was related to the accident. The incidents narrated merely show actions and behavior almost universally common to children, and the jury was not justified in ascribing them to the accident.

It is said the evidence shows the disposition of the child has been changed by reason of the injury; that before it he had been bright and healthy, well behaved and happy, but that after the accident he was sullen, backward and morose. It may be proper in the case of an adult of physical and mental maturity to show a difference in disposition and mental traits before and after an injury. N. Y. C. & St. I. W. Co. v. Luebeck, 167 Ill. 595. This is upon the assumption that the established disposition of the adult will not be changed within a short time without cause. This cannot be predicated of a child between two and one-half and four and one-half years of age. Its disposition and mental habits are then embryonic and formative changes occur accompanied by actions apparently abnormal and perverse. In the absence of any testimony connecting the subsequent exhibitions by plaintiff of his disposition or mental traits, with the injury, the jury cannot adjudge damages therefor upon a mere chance.

As there must be another trial we have refrained from





discussing all the evidence in detail.

Complaint is made of instructions seven and eight given at the request of plaintiff as permitting recovery for a loss of earnings during minority, which are recoverable only by plaintiff's father. The instructions should not be so construed. The element of damages is confined to those allowed in the declaration and as established by the preponderance of the evidence. There was no evidence as to the earning capacity. We think, however, the true intent of instruction eight would have been better expressed by making the last part read, "and as have been established," instead of "which have been established."

Objections are made to the rulings of the trial court upon the evidence. Some of these were erroneous although hardly of sufficient importance in themselves to necessitate a reversal and they will probably not occur again.

This also applies to the charge of improper conduct of the court. While there seems to have been confusion and disagreement between the judge and the attorney for defendant, yet nothing occurred so serious as to call for extended comment.

Apparently the mother of the child was in the court room, although she did not take the witness stand. Complaint is made that counsel for defendant was not permitted in argument to refer to her appearance and conduct while in court. Under some circumstances the conduct of interested parties might be referred to. In the present case there was no proper identification of the party as the mother of plaintiff. The practice of permitting counsel to comment and refer in argument to the appearance and demeanor of spectators in the court room should not be approved.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Holmes, F. J., and Bever, J., concur.



435 - 26609

GEORGE W. VARNEY,  
Appellee,

vs.

EDWARD HAZELHURST,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

2211.A. 651

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing an action of forcible detainer, upon trial by a jury had a directed verdict upon which judgment for possession was entered, from which defendant appeals.

Defendant occupied under a written lease running from February 1, 1920, to April 30, 1920. Defendant did not vacate the premises on this last day and on May 1 this action was begun.

Defendant here claims that as his tenancy was for a term of less than a year and he was holding over without special agreement, he was entitled to thirty days notice in writing under section 6, chapter 80, Landlord and Tenant. This section is not applicable where there is a written lease for a definite term. The statute applicable is section 12 of the Landlord and Tenant act, as follows:

"When the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession and no notice to quit or demand of possession is necessary."

Suit for possession under such circumstances may be commenced without first making a demand. Cooke Co. v. Fitzgerald, 131 Ill. App. 133; Cooke Co. v. Kaiser & Best B. Co., 163 Ill. App. 210; Condon v. Brockway, 157 Ill. 90.

There was no question of fact involved requiring the case to be submitted to the jury. The facts were stipulated.





The conversation between defendant and a prospective tenant, in which defendant said the premises were not for rent, does not amount to an oral leasing from plaintiff. For defendant to claim that he was a hold-over under a special agreement is not supported by the record and is inconsistent with his claim upon the trial and in this court, namely, that he is under Section 6 of the Landlord and Tenant act "where the tenant holds over without special agreement."

Defendant's points are wholly without merit, and the judgment is affirmed.

AFFIRMED.

Holden, F. J., and Dever, J., concur.



461 - 26635

WALTER V. BART,  
Appellee,

vs.,

GERALD F. MURPHY,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 651

MR. JUSTICE McSUMMELY DELIVERED THE OPINION OF THE COURT.

Upon trial in an action of forcible detainer plaintiff had a favorable verdict of a jury and judgment on the verdict, from which defendant appeals.

Defendant was a tenant of plaintiff of an apartment under a written lease which expired April 30, 1920, and plaintiff made out a case by introducing the lease with evidence that defendant was still in possession at the time of the trial, which was June 9, 1920, although possession had been demanded.

The defense is that in the latter part of February, 1920, the parties made a verbal agreement for a new lease commencing May 1, 1920, and that shortly afterwards two copies of a written lease pursuant to this understanding were delivered by plaintiff to defendant. As far there is no dispute. The crux of the controversy relates to whether the new proposed leases were signed by plaintiff. Defendant testifies that when he received them they were signed by plaintiff and that he himself subsequently signed them, although keeping them in his possession. There was testimony of other witnesses, who claimed to have seen the leases while in defendant's possession, that the leases bore the signature of plaintiff. Plaintiff denies having signed these papers and testified that, not having received the leases from defendant, and as subsequent matters occurred which determined him to withdraw the proposal, he notified defendant to this effect.

# 2011 A 051

2011 A 051 is a minor planet discovered on 2011 April 5.

It is a C-type asteroid, which is the most common type of asteroid. It is located in the main belt of asteroids, between Mars and Jupiter.

It has a diameter of approximately 1.5 kilometers. It is named after the year 2011 and the number 051, which is the order of its discovery.

It was discovered by the Catalina Sky Survey, which is a project of the University of Arizona. The survey is one of the most active asteroid discovery programs in the world.

It is a member of the Flora family, which is a group of asteroids that are thought to have originated from the same parent body. The Flora family is one of the largest families of asteroids in the main belt.

It is a relatively new discovery, and it is still being studied by astronomers. It is expected to be visited by a spacecraft in the future.

The proposed new leases were not produced upon the trial, and defendant attempted to explain this by testimony calculated to suggest that plaintiff had surreptitiously taken them. This suggestion however has very little, if any, foundation in the evidence.

The jury heard and saw the witnesses testifying upon the controverted point as to the presence of the signature of plaintiff upon the papers, and could better determine their credibility than we can. There was some evidence tending to show that this testimony was influenced by personal bias. We are unable to say the verdict was wrong.

The record does not support the claim that defendant was a tenant from month to month and hence entitled to thirty days notice of termination. He was a tenant under a written lease which by its terms expired on April 30, 1920, and in the absence of any valid extension the lessee should have given possession to the landlord at that time.

We see no sufficient reason to disturb the verdict on the question of fact, and under the law plaintiff was entitled to possession. The judgment is affirmed.

AFFIRMED.

Holsen, F. J., and Bever J., concur.





CHARLES BRALEY,

Appellee,

vs.

MINNEAPOLIS, ST. PAUL & SAULT  
STE. MARIE RY. CO. and W. C.  
McADOO, Director General of  
Railroads,  
(Minneapolis, St. Paul & Sault  
Ste. Marie Ry. Co.),  
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

221 I.A. 652

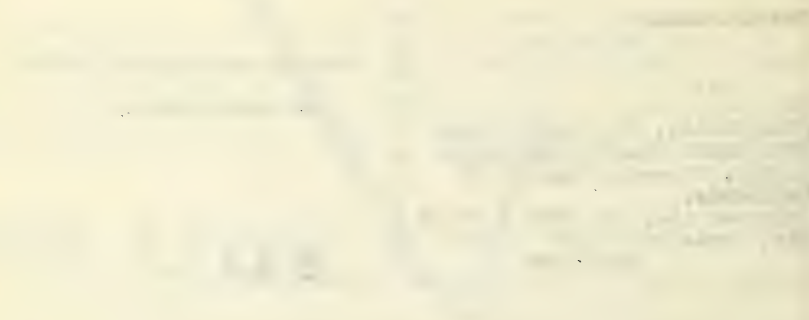
MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries alleged to be caused by the negligence of the defendant railroad, and upon trial had a verdict for \$3150, which was remitted to \$1500 and judgment entered for that amount, from which defendant appeals. The suit was dismissed as to the defendant McAdoo, Director General of Railroads.

The declaration consisted of two counts, the first of which charged that plaintiff, while attempting to board one of defendant's trains, was injured because it jerked and started forward suddenly; it also alleged a custom of not bringing a train to a full stop at the place in question. At the close of the evidence the jury was instructed to find the defendant not guilty as to this first count.

The second count charged that defendant "negligently and wrongfully, before plaintiff was fully and safely upon said train, started and jerked said train suddenly forward and negligently, carelessly and wrongfully closed one of the doors of the car, which plaintiff was then and there attempting to enter upon and against plaintiff and caused said door to strike against and upon plaintiff."

The accident happened December 13, 1916, between six



# THE UNITED STATES OF AMERICA

THE UNITED STATES OF AMERICA, a country of vast territory and diverse population, is situated in the North American continent.

The United States is a country of vast territory and diverse population, situated in the North American continent. It is a country of many different peoples, languages, and customs, and it is a country of many different climates and seasons. The United States is a country of many different cities and towns, and it is a country of many different industries and occupations.

The United States is a country of many different cities and towns, and it is a country of many different industries and occupations. It is a country of many different people, and it is a country of many different languages and customs. The United States is a country of many different climates and seasons, and it is a country of many different peoples, languages, and customs.

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The United States is a country of many different cities and towns, and it is a country of many different industries and occupations. It is a country of many different people, and it is a country of many different languages and customs.

and six thirty o'clock p. m., at the Franklin Park station of defendant, where its railroad runs north and south. The train was running south on the west track; it consisted of an engine and four cars, a combination baggage and socker, a smoking car, a first-class passenger coach and a parlor car; it was of the usual vestibule type. Plaintiff purchased his ticket at the station and says when the train came he attempted to board it, but it did not stop, and as he stepped on the moving train at the rear end of the smoking car, the vestibule door was closed in his face, striking him and throwing him to the ground; that the train was at this time moving at about three or four miles an hour and increasing its speed. Plaintiff is evidently mistaken in saying the train did not stop at the station. That it did stop in the usual and customary manner for passengers was established by the clear preponderance of the testimony. Plaintiff's counsel seems to abandon in argument the claim that the train did not stop, but insists that the proximate cause of the accident was the closing of the door, striking plaintiff, who testified that while he had his right foot on the lower step and his right hand on the upright, the vestibule was closed in his face. He held that this version of the accident is not supported by the weight of the evidence but it is shown to have occurred as follows: That the train arrived at the station and stopped. Plaintiff was on the platform started to board the train, but returned to the station to get his satchel which he had left inside. When he came out of the depot door the train was in motion, but plaintiff continued to run to the train although warned by the station agent to keep away. Plaintiff made a grab for the handles at the rear end of the next to the last coach just ahead of the parlor car; these vestibules were closed and plaintiff fell to the ground.

Counsel for plaintiff skillfully emphasizes some seem-





ing discrepancies in the stories of the witnesses, even to questioning the date of the accident and suggesting that the wrong train crew had testified. There can be no doubt but that the accident happened on the evening of December 15th, as testified to by plaintiff and the other witnesses; the circumstances all indicate that all the witnesses were testifying about the same occurrence.

Plaintiff's version rests solely upon his own testimony, which is contradicted in its essential features by the brakeman who <sup>is</sup> claimed to have closed the vestibule door; the station agent, an engineer of the defendant who was riding as a passenger on the train, and the corroborative evidence of other members of the train crew.

Plaintiff has failed to show that the accident happened because of the negligence alleged in his declaration, but, on the contrary, the preponderance of the evidence establishes that the accident happened through the negligence of plaintiff.

Similar facts have been considered in many cases where it was held that plaintiff was not entitled to recover. One almost exactly like the instant case is Ruley v. Ill. Central R. R. Co., 202 Ill. App. 523.

The judgment of the Circuit court is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Holden, P. J., and Bever, J., concur.

si

## FINDING OF FACTS.

We find as a fact that defendant was not guilty of the negligence charged in plaintiff's declaration or any count thereof causing the accident in question. We also find that said accident was caused by the negligent conduct of plaintiff.



176 - 25431

ACTNA LIFE INSURANCE COMPANY,  
a corp..

Appellee,

v.

PENNSYLVANIA COMPANY, a corp.,  
et al. on appeal of Pennsylvania  
Company, a corp.,

Appellant.

APPEAL FROM

CIRCUIT COURT,

DOCK COUNTY,

221 I.A. 352

MR. PRESIDING JUSTICE TAYLOR delivered the  
opinion of the court.

The plaintiff, Actna Life Insurance Company on  
November 28, 1913, brought suit, in assumpsit, against the  
defendant, Pennsylvania Company, to recover \$1,215.03, as  
premiums due on two insurance policies, and their extensions,  
claiming that although the policies were originally issued to  
the Roemheld Construction Company, as a Contractors Employers  
Liability Policy and a Contractors Public Liability Policy,  
yet the defendant was liable on the ground that "the Roemheld  
Construction Company was the agent of the defendant in securing  
the inclusion of the latter as the insured under the  
policies," and not only was the Roemheld Construction Company  
liable for the amount of the premiums earned under the policies,  
but likewise the defendant." In a trial in the Circuit Court,  
without a jury, the plaintiff, Actna Life Insurance Company,  
recovered a judgment against the defendant in the sum of  
\$1215.03 and costs. From that judgment this appeal was taken.

The defendant, Pennsylvania Company, made - the case





Fig. 1. Geological cross-section of the area around the town of ...

Scale 1:10,000

The geological structure of the area is characterized by a complex arrangement of rock units. The central part of the section is dominated by a thick sequence of limestone and sandstone, which are separated by thin layers of shale. To the right of this central sequence, there is a zone of gneiss and other metamorphic rocks. The boundary between the sedimentary and metamorphic rocks is marked by a fault line. The topography of the area is relatively flat, with some minor elevations. The town of ... is located in the central part of the section, near the fault line. The diagram is a simplified representation of the geological structure, based on field observations and geological maps. The scale of the diagram is 1:10,000, which allows for a detailed view of the geological features. The north arrow indicates the orientation of the section.

is not shown but it was prior to the issuance of the policies in question - a written contract with the Hoechst Construction Company by which the latter company was "to construct, build and finish ready for use, \* \* \* the thirteen new trusses necessary to replace a like number of trusses in the Union Station Shed, Chicago, Ill." etc.

Although the contract is not very clear about it, the Hoechst Construction Company was to remove the old trusses and not only make the new ones, but put them in place.

The compensation to be paid by the Pennsylvania Company was provided for in the following language:

"Actual cost plus ten (10) per cent, including the preparation of all necessary shop drawings, the fabrication and inspection of all material, the removal of existing trusses, the erection of new trusses, the necessary insurance on the public and laborers."

The contract also provided that during the progress of the work, the work done should be estimated and, to the extent of 90 per cent of that done, paid for on or about the 15th of the following month.

The contract further provided that the Hoechst Construction Company would take all necessary precautions against the occurrence of injuries to any person or property during the progress of the work, and would be responsible for the payment of such damages, if any, and indemnify and save harmless the Pennsylvania Company.

The contract further provided that in settlement of claims growing out of injuries to or death of employees, the defendant, the Pennsylvania Company should be included in the



releases that might be taken, and should be furnished duplicates of them, properly executed.

On June 8, 1912, pursuant to the application of the Rosenfeld Construction Co., there was issued by the plaintiff, Aetna Life Insurance Company, to the Rosenfeld Construction Co. as the assured, two policies, one entitled "Contractors Employers Liability Policy", and the other, "Contractors Public Liability Policy".

In both of these policies no one else is named as the assured but the Rosenfeld Construction Company. The first of these policies insured the Rosenfeld Construction Company against loss arising from claims upon the assured for damages on account of injuries to or death of employees of the assured. The second policy insured the Rosenfeld Construction Company against loss for damages on account of injuries to or death of any person or persons not employed by the insured by reason of the business described and conducted at the location named in said warrants. In each policy it was provided that the premium should be placed on a certain given rate to be computed on the basis of the total cost of the work, etc. Each policy was for the period of three months. Beginning on May 23, 1912 at noon and ending at noon August 20, 1912. Both policies were extended as follows: On September 14, 1912 to expire October 9, 1912; on October 17, 1912 to expire January 9, 1913; on January 14, 1913 to expire on March 9, 1913.

It was stipulated, at the trial, that after the issuance of the two policies and before August 21, 1912, a letter was received by Rosenfeld of the Rosenfeld Construction Company from the Pennsylvania Company, requiring that the





Pennsylvania Company and the Pittsburg, Ft. Wayne & Chicago Railroad Company be more specifically included under the protection of the policy. On August 12, 1912, the Reedheld Construction Company wrote to Marsh and McLeeman, agents of the plaintiff, informing them of the receipt of a letter from the Pennsylvania Company "for whom we are executing this work, in which they require that the Pennsylvania Company and the Pittsburg, Ft. Wayne & Chicago Railroad Company be more specifically included in the protection of these two policies." That letter also contained the following: "Inasmuch as this contract work was being done exclusively for the above named railroads, we beg to request that you indicate to us by a rider endorsement or letter to the above effect."

There appears as an endorsement or rider on each of the policies the following "August 21, 1912: It is hereby understood and agreed that from the date of issue the name of the Assured covered under this Policy is Reedheld Construction Company, percentage contractors, and Pennsylvania Company and the Pittsburg, Ft. Wayne & Chicago Railroad Company, owners."

No work was done by the Reedheld Construction Company under the contract in question after January 27, 1913. The premium which became due under the policies amounted to \$1212.03.

On July 12, 1913, Julius E. Reedheld, doing business as Reedheld Construction Company, filed a voluntary petition in bankruptcy and on July 14, 1913, he was duly adjudicated a bankrupt. Marsh & McLeeman, agents of the plaintiff, were scheduled as creditors in the amount of over \$1900 for insur-



ance premiums.

It was further stipulated that all bills for the premiums of \$1215.03 were sent by the plaintiff to Jules E. Roemheld or the Roemheld Construction Co. and that bills were so sent at intervals down to July 19, 1913, and that no bills were presented to the defendant until July 19, 1913.

On July 22, 1913, the plaintiff, through its agent, sent a statement to the defendants, asking what, if any, provisions had been made in the contract between the Roemheld Construction Company, Pittsburg, Ft. Wayne & Chicago Railroad Company and the defendant for the payment of the premiums.

On August 16, 1913, the defendant, through one of its agents wrote to the plaintiff stating that the Roemheld Construction Company alone was liable; that it acted as an independent contractor and procured the insurance as principal, and not as agent for the railroad company.

Certain statements of account and vouchers were offered in evidence showing that between February 28, 1912, and November 20, 1912, the defendant, Pennsylvania Company, paid to the Roemheld Construction Company, pursuant to the terms of the construction contract, for work and material, etc. \$33,677.00. That total was made up of ten monthly payments, the first payment being made February 28, 1912, and the last November 20, 1912. In the voucher for the payment of \$6076.46 of March, 1912, there appears the item "10% on labor for insurance on labor and public \$214.78." In the voucher for the payment of \$3677.61 in April, 1912, appears the item of "10% on above for insurance on labor and public \$376.67". In the voucher for May, 1912, appears the item "10% of above for liability





insurance on labor and public \$591.71." in the voucher for July, 1912, is the item "15% for insurance on labor and public \$307.88."

It appears, according to an endorsement on the application for the "employers' liability policy" that the amount of wages, including overtime and allowance paid to all persons in the employment of the Roemheld Construction Company, to which the policy applied during the seven months and three weeks ending March 9, 1913., was \$355.38. It appears, further, according to an endorsement on the application for the Contractors' employers' liability policy, that the full amount of wages, including overtime and allowances paid to all persons in the employ of the Roemheld Construction Company under the policy during the seven months and three weeks ending January 16, 1913, was \$7844.84.

At the close of all the evidence, the trial judge found as a matter of fact, at the request of counsel for the defendant, "that the defendant did not ever expressly promise the plaintiff to pay it the premiums on the policies in question or either of them." Counsel for the defendant submitted six written propositions of law, all of which were refused. One of them requested the court to hold that the Roemheld Construction Company "was an independent contractor and doing construction work covered by the insurance policies in question and not the agent of the defendant."

Subsequently, the court found the issues against the defendant and assessed the plaintiff's damages at \$1215.03, and entered judgment therefor.



11

The object of the construction contract between the defendant and the Roemheld Construction Company was that the latter should fabricate and set in place certain trusses and be paid by the defendant whatever it cost - which included the cost of certain insurance - the Roemheld Construction Company together with 10% profit. The trusses were to be, and were, made on the premises of the Roemheld Construction Company and were put up on the premises of the defendant. Under the contract the construction Company was dealt with both as manufacturer and builder and was dealt with at arm's length as a third person and as one entirely independent; not as a servant or employee or agent, but as an equal. The fact that the contract did not state in exact figures the price to be paid by the defendant for the fabrication and erection of the trusses but provided instead that the defendant pay "actual costs plus ten (10) per cent", in no way affected the legal relationship or independence of the parties nor did it make the one an agent and the other a principal. It is our opinion that the contract between the Pennsylvania Company, the defendant, on the one hand, and the Roemheld Construction Company on the other, was made between them as principals. Considering then, that both parties to the construction contract dealt and contracted with each other as principals, and the evidence that the Roemheld Construction Company itself applied for the two policies of insurance and secured them in its own name, as the sole assured, and that no change was made in the relationship between the Roemheld Construction Company and the plaintiff until, at least, August 21, 1912, it follows that prior to that time there was no legal obligation whatever on the defendant, Pennsylvania



Company, to pay any part of the premiums for that insurance to the plaintiff.

The Rockwell Construction Company alone applied for the policies and they were issued and delivered to it as the sole assured. The estimated premiums to the extent of \$900.00 became at once due and payable, that is on May 28, 1912, and were due from the Rockwell Construction Company alone. There was no mention of the defendant in either policy as an insured until August 21, 1912 - after the defendant had notified the Rockwell Construction Company by letter, requiring that the Pennsylvania Company and the Pittsburg, St. Wayne and Chicago Railway Company be more specifically included in the protection of the policies, and the Rockwell Construction Company on August 12, 1912, wrote to the agents of the plaintiff informing them of the receipt of the letter from the Pennsylvania Company and requested that the plaintiff indicate by writing or endorsement or letter that the defendant be more specifically included in the protection of the two policies - when the agents of the plaintiff placed an endorsement or rider on each of the policies to the effect that it was understood and agreed that the names of the assured covered by the policies were Rockwell Construction Company, percentage contractors, Pennsylvania Company and the Pittsburg, St. Wayne and Chicago Railway Company, owners. It would seem, therefore, that it is difficult to contend with reason that the defendant was liable for premiums for any insurance that existed under the policies in question between May 28, and August 21, 1912. We are of the opinion that the Rockwell Construction Company alone was liable throughout that time.

Of course, a slightly different question arises as to





the relationship between the plaintiff and the defendant after August 21, 1912, when the rider or endorsement were made on the policies. It is well to note that prior to August 21, 1912, about three fourths of the work of the construction company had been done and was paid for by the defendants.

In paragraph 12 of the construction contract the words "the necessary insurance on the public and laborers" are used in such a way as to show quite conclusively that one of the costs to be paid the Rosenfeld Construction Company by the defendant, and upon which the Rosenfeld Construction Company was to figure its 10% of profit, was the charge for premiums for just such policies as were subsequently taken out by the Rosenfeld Construction Company; in other words, the Rosenfeld Construction Company, as a principal, undertook to obtain the insurance and to be alone responsible for the premiums; and the result then is, that, as the Rosenfeld Construction Company, acting as a principal, made its contract for insurance with the plaintiff as a result of one of its obligations under its construction contract with the defendant and as there is no evidence of any promise, express or implied, on the part of the defendant to the plaintiff, the plaintiff's cause of action fails.

It was stipulated on the trial that from time to time the plaintiff sent bills or statements to the Rosenfeld Construction Company and that all the bills and statements that were sent by the plaintiff for the premiums in question down to July 10, 1912, were sent to the Rosenfeld Construction Company.



It appears, therefore, that throughout the whole transaction and until the Hoeckheld Construction Company became a bankrupt, the conduct of the plaintiff itself suggests very strongly that credit was extended solely and exclusively to the Hoeckheld Construction Company. Watts v. Thayer, 56 Ill. App. 282.

We are of the opinion that the judgment must be reversed.

REVERSED.

O'CONNOR AND THOMSON, J.J. CONCUR.

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257 - 25815

AGNES VICTORIA ACHLEY.

Appellee.

v.

GEORGE J. WILLIAMS.

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 652

MR. PRESIDING JUSTICE LAYTON delivered the opinion of the court.

The plaintiff brought suit against the defendant for damages for ejection from certain premises which she had rented. The cause was tried before a jury and a verdict rendered in the sum of \$2700.00. A remittitur of \$1,000.00 was made and judgment entered in favor of the plaintiff and against the defendant in the sum of \$1700.00.

On August 13, 1917, the plaintiff as tenant and the defendant as lessor executed a written lease of a flat in a twenty-one flat building known as 949 Galt avenue, Chicago, the term to begin on September 1, 1917, and expire on September 30, 1918. The rent was \$480.00 for the year, payable in monthly installments of \$37.50 in advance on the first day of each month at the office of the lessor. A receipt dated Chicago, August 13, 1917, and reciting a payment of \$15.00 by the plaintiff for rent from September 1 to September 31, 1917, and signed by George J. Williams, was offered in evidence. That receipt was given at the time the lease was signed.

It was admitted by the plaintiff that she rented a flat on the premises from a Mr. Dargin. She testified that



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she paid the rent for September, 1917, and that on October 23, 1917, she paid \$32.00 to one Coyne and received a receipt therefor. There was offered in evidence a receipt dated October 23, 1917, which recited, among other things, that Coyne, a collector for the defendant, received of the plaintiff on October 23, 1917, \$32.00 in cash, "a verbal promise to pay October 24, 1917, \$6.50", a note signed by her payable in sixty days from date, \$3.00; all given for October rent and for court costs.

The evidence of the plaintiff is to the effect that she rented the premises from the defendant; that she had a conversation with one Dargin who told her that he was manager; that on October 23, 1917, she paid \$32.00 to one Coyne and received a receipt therefor which is as follows:

"George J. Williams, attorney at law,  
Bonheur Building, 326 River Street,  
Suite 311. Tel. Central 2100.

October 23, 1917.

Received of Mrs. Victoria Ackley cash, \$32.00  
A verbal promise to pay October 24, 1917. 5.50  
A note signed by her payable in 60 days from date, 3.00  
The above was given for rent of Apartment 1st, 949 Galt Avenue for Oct. Rent and Court Costs. It is agreed that suit now pending in court for possession of the above apartment will be withdrawn. This however is subject to the approval of George J. Williams.

W. W. Coyne,  
Collector."

She testified that she paid the \$6.50 mentioned in the receipt on October 23, 1917 and received a receipt for that which is as follows:

"Geo. J. Williams,  
326 River Street,  
Chicago, Oct. 23, 1917.

Received of Mrs. V. Ackley Five and 50/100 Dollars for rent of Flat No. 1, 949 Galt Building, from Bal. of October rent.

George J. Williams



She further testified that the money was paid to one Coynes in the office of the defendant, 326 River street, Chicago; that at the time she paid that money she told Coynes that she would leave for New York City that night and leave her boy and girl in the house and would be back not later than the 16th of November, the next month; that Coynes said it was all right that he would give orders and no one would be allowed to go in the door and that it would be all right so long as she paid her rent by the 20th of November; that the payment which she made of \$32.00 was made at the defendant's office and Coynes was there and received the money and signed the receipt there on the letter head of the defendant.

Her evidence is further to the effect that she returned to Chicago on November 15, 1917, between nine and ten o'clock and went to the premises in question but no one answered the bell and she found her children at her daughter's residence on Rokeby street; that she went to the premises in question again the next day and rang the bell but nobody answered; that she could not get in and could not find her goods and effects and did not know what had become of them, until the next day when she went to the defendant's office; that Coynes then and there told her that her goods were in storage. She further testified that she went to the storage; that she did not know before she received a letter from Hollander where her furniture had been removed to.

The witness Durgin, an employee of the defendant testified that the first time he met the plaintiff he collected some rent from her and got a lease signed for the flat at 949 Galt avenue; that the receipt he gave for the





rent at that time was signed "George J. Williams, Per A. Bargin"; that he was employed by the defendant taking care of the repairs, renting flats and decorating them, also to show flats to tenants. He further testified that he had regular hours at the defendant's office at 9:30 in the morning; that the building in question is a 31 flat building and that he has collected rent on those premises; that from August until November, Coynes collected all the rents that did not come in by check; that Coynes has a desk in Williams' office; that the defendant's office consist of three rooms; that Coynes occupied the outer office, the book-keeper and himself the next office and the defendant the third; that anyone going to see the defendant would have to see him, the witness, first; that on November 8th, after trying the front and back door of the apartment he went out on the street and got two men to move the furniture out into the back yard; that he then called up Hollander and gave him the order to store the goods in Mrs. Ackley's name subject to her orders; that all the furniture was moved out of the flat; that he told the defendant on the 9th or 10th of November that he had taken the furniture out.

On cross-examination he testified that he used his own means in dealing with a tenant; that he told the defendant he was the man that could get his rents and could get them without causing him annoyance or trouble and that he then used his own judgment.

The defendant, Williams, testified that he had a contract with Coynes for the collection of rents on four north side buildings; that he never gave Coynes authority to do any other business than collect rents; that he gave



Goynes \$7.50 a week and a desk and a telephone and the use of a typewriter, for which Goynes was to collect the rents of the four buildings; that he instructed Goynes that if rents were not paid before the 25th to turn the matter over to one Malone who took care of the law collections; that on November 8th information reached him, through his bookkeeper, that the plaintiff had not paid her November rent; that he then ordered a writ of restitution issued on the judgment that had been obtained in October; that before receiving the writ he learned that the plaintiff had been dispossessed by Goynes. He further testified that on October 26, 1917, he, the defendant, wrote to the plaintiff acknowledging the receipt of the October rent and court costs and stating that upon the payment of the November rent on the first day of November, 1917, he would file a satisfaction of judgment in the case of Williams v. Ackley; that if not paid he would order execution on eviction. He further testified that his offices are at 306 River street and that the outer room is occupied by the Russell Agency, which is run by Goynes; that the first person customers meet is Durgin, and when he is not there, the bookkeeper, Miss McDonald; that the bookkeeper and Durgin occupy the second office and the defendant the third.

At the close of the evidence the jury returned a general verdict finding the defendant guilty and assessed the plaintiff's damages at the sum of \$2700.00. The plaintiff remitted \$1,000.00 from the verdict and judgment was entered against the defendant in the sum of \$1700.00.

It is the contention of the plaintiff that the verdict is manifestly against the weight of the evidence.





The evidence shows that on October 23, 1917, the plaintiff settled with one Coyne, an agent of the defendant, for the October rent, and it is the testimony of the plaintiff that she told Coyne, the agent of the defendant, at that time, that she was going to leave for New York and would be back not later than the 16th of the following month, and that Coyne said that it would be all right so long as she paid her rent by the 20th of that month. Yet, on November 15, 1917, when the plaintiff returned she found that her furniture had been removed to a storage warehouse; it had really been moved pursuant to authority given by the defendant. Counsel for the latter argue very strongly that the evidence does not sufficiently show that the defendant authorized the acts of Coyne in the removal of the furniture of the plaintiff from the premises in question. The evidence on that subject is somewhat voluminous but in our opinion a careful examination of it justifies the conclusion that the defendant must be considered as responsible for the acts of both Coyne and Burgin; and, further, that the entry was forcible and constituted a trespass. Reeder v. Purdy, 41 Ill. 279.

It is contended by the defendant that the damages assessed were excessive.

Considerable evidence was introduced as to the value of the household goods, and seems to have been put in on the theory that their value was of special importance in determining the damages suffered by the plaintiff. That, however, was an erroneous theory. As we have already said the plaintiff was entitled to actual damages to her property, if any were shown, and to exemplary or punitive damages by reason of the wilful trespass.

The household goods were put in storage, and could, practically intact, have been obtained by the plaintiff from the storage warehouse. Some of the things the plaintiff did take out; the rest she left and never saw fit to take. The total value of all the household goods was given, all the way from \$40.00 to \$2000.00.

The evidence shows that the plaintiff received information as to where her goods were stored; that she went to the warehouse



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and casually examined them. It is her testimony that she never took away from the warehouse any of the goods that were stored except some of the children's clothes.

Assuming as we do - believing that the evidence justifies it - that the defendant was guilty of a wilful trespass, it follows that the plaintiff was entitled to an award not only for actual damages to her property but exemplary or punitive damages. And, further, inasmuch as the actual damage to the personal property was small, as far as the evidence shows what the damage was, and as the evidence shows that she could have taken from the storage warehouse whatever had been placed there by the defendant, it follows, that practically all the amount allowed as damages in the original verdict must be considered to be punitive.

In *Dearlove v. Herrington*, 17 Ill. 251, the court said:

"We have looked into the testimony as it appears in the record, carefully, and it discloses a case where an entry was made upon a tenant, by appellants, acting for the landlord, before his term had expired, other tenants put in, and dominion exercised by appellants over the goods and chattels of appellee, removing them from one room to other rooms, and depriving appellee of the beneficial enjoyment of the dwelling house, so necessary to the comfort of himself and family, and treating him with the greatest indignity and his rights with contempt. \*\*\* It cannot be said that one thousand dollars damages would be excessive, if the plaintiff was the tenant of a magnificent mansion, and so collected as the evidence discloses in this case. Shall the fact that the plaintiff is old and poor, and comparatively an insignificant figure in the great swarm of human society, subject him to a diminished measure of justice? When the lawlessness of the act is considered, and the circumstances, we can not think the damages are excessive, or afford any evidence that the jury did not take a cool and deliberate view of the case. If it was true, that the plaintiff was holding over, in defiance of his lessors, they would have no right to take the law in their own hands, and thus redress their wrongs."

The question then arisen, was the final judgment of \$1750.00 excessive? The appraisal of exemplary or punitive damages under such circumstances is exceedingly difficult. There are no set standards by which to formulate a judgment. It is a matter peculiarly within the province of the jury. Considering the illegal trespass, the taking out of all the household goods of the defendant, their disposition, her humiliation and attendant discomfiture

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\* 1994-95: 75% (1994-95) and 10% (1995-96)

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Approved by the Board of Directors on 11/11/2014

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11. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

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and a good steady one.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the situation in the Republic of China (Taiwan) and the Republic of China (Taiwan) has not yet received any information from the Government of the Republic of China (Taiwan) regarding the situation in the Republic of China (Taiwan).

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DATE 08-01-2001 BY 60322 UCBAW

10. The above information was obtained from the files of the [redacted] and is being furnished to you for your information.

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On 11/11/11, I was at the 10th floor of the building and saw a man in a white shirt and dark pants walking down the stairs. He was carrying a bag and looking down at it. I saw him again on 11/12/11, 11/13/11, 11/14/11, 11/15/11, 11/16/11, 11/17/11, 11/18/11, 11/19/11, 11/20/11, 11/21/11, 11/22/11, 11/23/11, 11/24/11, 11/25/11, 11/26/11, 11/27/11, 11/28/11, 11/29/11, 11/30/11, 12/1/11, 12/2/11, 12/3/11, 12/4/11, 12/5/11, 12/6/11, 12/7/11, 12/8/11, 12/9/11, 12/10/11, 12/11/11, 12/12/11, 12/13/11, 12/14/11, 12/15/11, 12/16/11, 12/17/11, 12/18/11, 12/19/11, 12/20/11, 12/21/11, 12/22/11, 12/23/11, 12/24/11, 12/25/11, 12/26/11, 12/27/11, 12/28/11, 12/29/11, 12/30/11, 1/1/12, 1/2/12, 1/3/12, 1/4/12, 1/5/12, 1/6/12, 1/7/12, 1/8/12, 1/9/12, 1/10/12, 1/11/12, 1/12/12, 1/13/12, 1/14/12, 1/15/12, 1/16/12, 1/17/12, 1/18/12, 1/19/12, 1/20/12, 1/21/12, 1/22/12, 1/23/12, 1/24/12, 1/25/12, 1/26/12, 1/27/12, 1/28/12, 1/29/12, 1/30/12, 1/31/12, 2/1/12, 2/2/12, 2/3/12, 2/4/12, 2/5/12, 2/6/12, 2/7/12, 2/8/12, 2/9/12, 2/10/12, 2/11/12, 2/12/12, 2/13/12, 2/14/12, 2/15/12, 2/16/12, 2/17/12, 2/18/12, 2/19/12, 2/20/12, 2/21/12, 2/22/12, 2/23/12, 2/24/12, 2/25/12, 2/26/12, 2/27/12, 2/28/12, 2/29/12, 2/30/12, 3/1/12, 3/2/12, 3/3/12, 3/4/12, 3/5/12, 3/6/12, 3/7/12, 3/8/12, 3/9/12, 3/10/12, 3/11/12, 3/12/12, 3/13/12, 3/14/12, 3/15/12, 3/16/12, 3/17/12, 3/18/12, 3/19/12, 3/20/12, 3/21/12, 3/22/12, 3/23/12, 3/24/12, 3/25/12, 3/26/12, 3/27/12, 3/28/12, 3/29/12, 3/30/12, 3/31/12, 4/1/12, 4/2/12, 4/3/12, 4/4/12, 4/5/12, 4/6/12, 4/7/12, 4/8/12, 4/9/12, 4/10/12, 4/11/12, 4/12/12, 4/13/12, 4/14/12, 4/15/12, 4/16/12, 4/17/12, 4/18/12, 4/19/12, 4/20/12, 4/21/12, 4/22/12, 4/23/12, 4/24/12, 4/25/12, 4/26/12, 4/27/12, 4/28/12, 4/29/12, 4/30/12, 5/1/12, 5/2/12, 5/3/12, 5/4/12, 5/5/12, 5/6/12, 5/7/12, 5/8/12, 5/9/12, 5/10/12, 5/11/12, 5/12/12, 5/13/12, 5/14/12, 5/15/12, 5/16/12, 5/17/12, 5/18/12, 5/19/12, 5/20/12, 5/21/12, 5/22/12, 5/23/12, 5/24/12, 5/25/12, 5/26/12, 5/27/12, 5/28/12, 5/29/12, 5/30/12, 5/31/12, 6/1/12, 6/2/12, 6/3/12, 6/4/12, 6/5/12, 6/6/12, 6/7/12, 6/8/12, 6/9/12, 6/10/12, 6/11/12, 6/12/12, 6/13/12, 6/14/12, 6/15/12, 6/16/12, 6/17/12, 6/18/12, 6/19/12, 6/20/12, 6/21/12, 6/22/12, 6/23/12, 6/24/12, 6/25/12, 6/26/12, 6/27/12, 6/28/12, 6/29/12, 6/30/12, 7/1/12, 7/2/12, 7/3/12, 7/4/12, 7/5/12, 7/6/12, 7/7/12, 7/8/12, 7/9/12, 7/10/12, 7/11/12, 7/12/12, 7/13/12, 7/14/12, 7/15/12, 7/16/12, 7/17/12, 7/18/12, 7/19/12, 7/20/12, 7/21/12, 7/22/12, 7/23/12, 7/24/12, 7/25/12, 7/26/12, 7/27/12, 7/28/12, 7/29/12, 7/30/12, 7/31/12, 8/1/12, 8/2/12, 8/3/12, 8/4/12, 8/5/12, 8/6/12, 8/7/12, 8/8/12, 8/9/12, 8/10/12, 8/11/12, 8/12/12, 8/13/12, 8/14/12, 8/15/12, 8/16/12, 8/17/12, 8/18/12, 8/19/12, 8/20/12, 8/21/12, 8/22/12, 8/23/12, 8/24/12, 8/25/12, 8/26/12, 8/27/12, 8/28/12, 8/29/12, 8/30/12, 8/31/12, 9/1/12, 9/2/12, 9/3/12, 9/4/12, 9/5/12, 9/6/12, 9/7/12, 9/8/12, 9/9/12, 9/10/12, 9/11/12, 9/12/12, 9/13/12, 9/14/12, 9/15/12, 9/16/12, 9/17/12, 9/18/12, 9/19/12, 9/20/12, 9/21/12, 9/22/12, 9/23/12, 9/24/12, 9/25/12, 9/26/12, 9/27/12, 9/28/12, 9/29/12, 9/30/12, 10/1/12, 10/2/12, 10/3/12, 10/4/12, 10/5/12, 10/6/12, 10/7/12, 10/8/12, 10/9/12, 10/10/12, 10/11/12, 10/12/12, 10/13/12, 10/14/12, 10/15/12, 10/16/12, 10/17/12, 10/18/12, 10/19/12, 10/20/12, 10/21/12, 10/22/12, 10/23/12, 10/24/12, 10/25/12, 10/26/12, 10/27/12, 10/28/12, 10/29/12, 10/30/12, 10/31/12, 11/1/12, 11/2/12, 11/3/12, 11/4/12, 11/5/12, 11/6/12, 11/7/12, 11/8/12, 11/9/12, 11/10/12, 11/11/12, 11/12/12, 11/13/12, 11/14/12, 11/15/12, 11/16/12, 11/17/12, 11/18/12, 11/19/12, 11/20/12, 11/21/12, 11/22/12, 11/23/12, 11/24/12, 11/25/12, 11/26/12, 11/27/12, 11/28/12, 11/29/12, 11/30/12, 12/1/12, 12/2/12, 12/3/12, 12/4/12, 12/5/12, 12/6/12, 12/7/12, 12/8/12, 12/9/12, 12/10/12, 12/11/12, 12/12/12, 12/13/12, 12/14/12, 12/15/12, 12/16/12, 12/17/12, 12/18/12, 12/19/12, 12/20/12, 12/21/12, 12/22/12, 12/23/12, 12/24/12, 12/25/12, 12/26/12, 12/27/12, 12/28/12, 12/29/12, 12/30/12, 1/1/13, 1/2/13, 1/3/13, 1/4/13, 1/5/13, 1/6/13, 1/7/13, 1/8/13, 1/9/13, 1/10/13, 1/11/13, 1/12/13, 1/13/13, 1/14/13, 1/15/13, 1/16/13, 1/17/13, 1/18/13, 1/19/13, 1/20/13, 1/21/13, 1/22/13, 1/23/13, 1/24/13, 1/25/13, 1/26/13, 1/27/13, 1/28/13, 1/29/13, 1/30/13, 1/31/13, 2/1/13, 2/

1. The first part of the report is a general statement of the purpose of the study and the objectives to be achieved. This is followed by a brief review of the literature on the subject, which is intended to provide a background for the study and to show the relationship of the study to the existing knowledge in the field.

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1. The first step is to identify the problem or question that needs to be answered.

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we are of the opinion that, under the circumstances, \$1000.00 would be reasonable damages.

As to the contention of the defendant that the declaration does not sustain the verdict:-

The first count sets up the wrongful invasion by the defendant of the plaintiff's flat, and carrying away of the plaintiff's household goods without due process of law, thus causing shame and humiliation to the plaintiff and the damage to her property. The second count sets up that the defendant wrongfully broke into the plaintiff's home and without due process of law removed her household goods, at a time when the defendant was not in default with the rent, and ejected the two minor children of the plaintiff and removed all the plaintiff's household goods in the absence of the plaintiff, and that as a result of the conduct of the defendant the plaintiff became in part paralyzed and suffered other damages to herself, and also to her property.

Inasmuch as the plaintiff was rightfully in possession and the entry of the defendant was forcible and illegal we are of the opinion that either count is sufficient to sustain the verdict.

As to the instructions: What purport to be sixteen refused instructions and six given instructions appear in the common law record; and in the bill of exceptions there appear what purport to be seven instructions, but which are not marked either given or refused, and which do not show by whom offered.

Under the circumstances, it is, of course, impossible to pass upon the contentions concerning them.

Provided, therefore, that the appellee in <sup>ten</sup> ~~twenty~~ days remits \$750.00 of the former judgment, that judgment will be affirmed to the extent of \$1000.00, otherwise the judgment will be reversed, and the cause remanded.  
on remittitur.

**AFFIRMED** / IN PART.

O'CONNOR and THOMSON, J.J. concur.

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356 - 25616

DAISY W. MASON,

Appellee,

v.

ANTON E. SWARD,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

221 I.A. 652

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff while walking down a public stairway in a building belonging to the defendant put her left foot in an opening between the newel post and a platform or one of the treads in the stairway and was thrown down and injured. She brought suit against the defendant and recovered a verdict and a judgment in the sum of \$5,000.00.

The declaration originally consisted of three counts. Two of these, however, were withdrawn. The count that remained alleged in substance the following: That on the 15th day of September 1914, defendant was the owner of a certain building at 5536 Cornell avenue, containing various apartments occupied by various tenants, that the defendant exercised and retained control over the passageway, stairway, steps, landing platform and railing extending from the first to the third floor of said building, which were used in common by the tenants and others lawfully using the same; that it was the duty of defendant to keep said stairway, steps, landing, etc., in reasonably safe condition and repair, and sufficiently and properly lighted for purposes of ingress



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and egress; that the defendant then and there negligently, carelessly and unlawfully caused, permitted and allowed said stairway, steps, landing, etc., to be and remain dark and insufficiently lighted, and in an unsafe and dangerous condition in this, that at the point where the steps of said stairway leave off, and the said landing begins, between the second and first floors of said premises, the boards or planks with which the said steps of said stairway or landing were constructed had an unprotected open space or hole in one end thereof, so that persons using said stairway and platform, and unfamiliar with the conditions thereof, would be apt to step into said space or hole, all of which facts the defendant knew or ought to have known; that plaintiff was lawfully in said building as a guest of one of the tenants, and was with the exercise of ordinary care using said stairway, and by reason of the same being dark and poorly and insufficiently lighted, and by reason of said hole or open space being left in said stairway, without the knowledge of the plaintiff, she stepped into said hole or open space and by reason thereof, she tumbled and was thrown and fell with great force and violence down to and upon said stairway, steps and platform, and injured her left knee.

The evidence shows substantially the following: The building in question was a large horseshoe shaped, three story apartment building, containing thirty apartments, situated at 5526 Cornell Avenue, Chicago. There were five entrances. The entrance to the stairway in question faced north. The building was completed in the winter and spring of 1912 and 1913, according to the plans of an architect named Bishop. The design and plan of the stairway and landing in



question between the first and second floor provided for nine steps from the first floor to the platform half way between the first and second floors and eight steps from the half way platform to the level of the second floor; the treads were two feet by ten inches in length, and the half way platform was three feet nine inches by six feet nine inches. At the landing, facing north, there was a window three feet two inches wide by four feet high; the sill of that window was five feet above the platform. On the half way platform as you go down the stairs from the second floor and just as you make the turn to go down to the first floor there is at the newel post, a curve, leaving an open space between the tread or landing and the newel post. That opening is described in the declaration as "an unprotected open space or hole." The stairway in question was carpeted the usual way, in the middle area.

About two o'clock in the afternoon of September 15, 1914, the plaintiff went to an apartment on the second floor of the building in question to visit a Mrs. Buckingham. She remained there until about six thirty P.M. when she left to go to her hotel. On the day in question the sun set at six P.M. so that when she left the Buckingham apartment to go down the stairs it was thirty minutes after sunset. As she left Mrs. Buckingham, that lady remarked upon the darkness. The electric lights had not yet been lighted, when she started down the stairs holding on to the railing on her left hand until she reached the newel post at the so-called half way platform or landing. As she was stepping down to the next tread or to the half way platform or landing her left foot slipped into, or went into, the open space





between it and the newel post and she fell to the platform and on the stairway and injured her left knee. At the time of the fall and injury she was alone. She went to the hotel where she lived, applied bandages to her knee and took care of it as well as she could. Shortly after the injury she and her husband went to Philadelphia and New York and returned on October 20, 1914. About November 26, pursuant to the advice of a doctor the leg was placed in a cast.

On January 14, 1915, when she still had a cast on her leg she started down some steps in the Windemere Hotel and seriously injured her face. On January 23, 1915, owing to his ill health, she and her husband went to California. At that time the cast was still on her leg. On March 3, 1915, the last cast was taken off while she was in Los Angeles. After undergoing some treatments in California, such as mud baths and massage, her leg being in a cast for about four months, she and her husband returned to Chicago in June 1915. Her testimony at the trial is to the effect that her knee was sore and that prior to the injury in question she never had pains and stiffness in, and swellings of, the knee.

After the cast was taken off and until she left California her knee was very stiff and gave her a great deal of pain; the leg was rigid and had to be made supple so that she could move it. After every day treatment for six weeks with packing and massage the leg was slightly better but not entirely free from pain, and during the next three months she was unable to go down stairs except like a child, by putting both feet on each step. It was nearly Christmas before she was able to walk naturally. When she



and her husband came back to Chicago in June, 1915, she could only walk very stiffly, and from that time on it has ached and given her pain. It is her evidence that it is never free from ache or pain; that it feels like, "an ulcerated tooth inside"; that when walking it is very weak and sometimes gives way under her and causes her to fall.

At the time of the injury the plaintiff was thirty seven years of age.

The facts in the case are simple and practically all admitted. There is a slight controversy about the amount of light at the time, but it is only fair to infer from the evidence that at the time in question the hall and stairway were so dark that the condition about the novel post and the landing could not be fairly seen by one descending the stairs, at least, without unusual effort. As the plaintiff had a perfect right to be there, the only question is whether, considering the physical condition about the novel post, the opening, and the darkness, all in combination, the defendant was chargeable with negligence. In Brugher v. Bucktonkirch, 29 App. Div. (N.Y.) 342, where the complaint set up that complainant, walking, at noon, along a hall in a flat building, "came upon one or more steps or stairs down and directly across said hall" and "in consequence of the insufficient light in said hall and on said steps or stairs" she fell, it was held that the complaint stated a good cause of action. The court used the following language; "It has been many times held that where premises are occupied by several families, and the halls or passageways are under the control of the landlord, the only obligation resting upon him is to use care in keeping them in a reasonably safe condition. Ordin-

Die erste, die ich in dieser Hinsicht bemerken möchte, ist die, dass die meisten Menschen, die in der Welt leben, nicht wissen, was sie tun. Sie leben in einer Welt, die von der Natur geschaffen ist, und sie wissen nicht, wie sie mit der Natur umgehen sollen. Sie wissen nicht, was die Natur ihnen zu sagen hat, und sie wissen nicht, was sie von der Natur erwarten können. Sie leben in einer Welt, die von der Natur geschaffen ist, und sie wissen nicht, wie sie mit der Natur umgehen sollen.

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arily, the landlord is under no general duty to keep his hallways lighted. Malin v. Townsend, 2 City Ct. R. 417, affirmed 107 N.Y. 603, 14 N.E. 611; Hildebrand v. Achenak, 2 City Ct. R. 249; Fucht v. Behrens (City Ct. Brook) 7 N.Y. Supp. 193; Hilsenbeck v. Gubring, 131 N. Y. 574, 30 N. E. 580; Gorman v. White, 19 App. Div. 524, 46 N.Y. Supp. 1. There are, however, exceptions to this general rule, growing out of some unusual construction of hallways or passageways which, in order to render them reasonably safe to persons lawfully using them, need to be lighted. Thus where the flooring of the hall or passageway is uneven, or arranged with steps or an opening such as an elevator shaft, so situated as to be cut off from the natural light of day, by reason of which darkness their presence cannot be known, failure on the part of the landlord to supply artificial light is negligence."

In Harwood v. Cook, 154 Mass 236, where a woman undertook to descend from the fifth floor of a building by means of a stairway, the elevators having stopped, and as she was going down it grew dark and she went on holding to the handrail with both hands, and at a turn in the stairs lost her hold and fell and was injured, it was held in an action against the owner of the building that the question whether the defendant was negligent in not lighting the stairway and whether the plaintiff exercised due care in descending, under the circumstances, were matters for the jury; and in the opinion in that case, the court said: "The jury may well have found upon the evidence that the stairs were unsafe unless lighted, and that the construction of the stairway and building was such as to cut off the natural light, and at times when it was full daylight, and when the stairway was properly in use, to render it unsafe without artificial light,



and that the plaintiff, while going down the stairs from the fourth to the third floor, fell at the turn of the stairs at the back of the well in consequence of the stairway not being artificially lighted, and that the stairway was then unsafe for want of such light. \* \* \* The jury were justified in finding that the defendants owed to the plaintiff the duty of providing such light as would render the stairway reasonably safe, and that they failed in that duty."

We are of the opinion that the construction of the stairway in question was of such a character that in order to render it reasonably safe to those lawfully using it after dark, artificial light was necessary, and that the statement of facts which was presented to the jury was such as to justify the inference that the duty devolving upon the landlord of using reasonable care in regard to his premises was not complied with.

It is contended by the defendant that the plaintiff was guilty of contributory negligence and that there was sufficient evidence on that subject to justify its submission to the jury. We are of the opinion that the conduct of the plaintiff, in undertaking to go down the stairs and in taking hold of the handrail as she proceeded, was not subject to criticism but was obvious evidence of ordinary care.

It is contended by the defendant that the verdict is excessive and was plainly the result of sympathy or passion and prejudice. Considerable evidence was presented to the jury to show the nature and extent of the injuries which she suffered as a result of the fall. There is no doubt but that it was a serious injury. At the time of the trial, nearly five years





after the injury, the knee was not well, and it is quite obvious from the evidence that it was reasonably certain that it was permanently impaired. We do not feel able to conclude that the determination of the jury as to the damages was excessive.

Objections are made concerning certain instructions. As to instruction No. 5, which informed the jury that "the defendant owes plaintiff the duty to keep said stairways, hall and stairway platform, in a reasonably safe condition for a reasonable use thereof by plaintiff", clearly stated the law. It must be assumed, from the verdict of the jury, that it was their opinion that, as the stairway and hall were not lighted, and having in mind the way in which it was built, the defendant failed in his duty to keep them "in a reasonably safe condition for a reasonable use thereof by the plaintiff."

Counsel for the defendant criticizes instructions numbered 11, 12 and 13, but we think without sufficient justification.

As to instruction numbered 26, which was refused, it may be said that it is practically entirely covered by instruction numbered 21, which was given.

Instruction numbered 27 merely reiterates what was already contained in instructions numbered 18 and 19. Instruction numbered 28, which was refused was defective in not covering the case which the plaintiff undertook to make out. That instruction intimated that it was necessary to show the defendant was guilty of negligence even if he merely failed to light the hall and stairway in question. That, of





course, by itself, was not the plaintiff's case.

Instruction numbered 29, which was refused, was not applicable to the cause of action the plaintiff was undertaking to establish.

Instruction numbered 30 which was refused, likewise, was inapplicable and for the same reason.

Instruction numbered 31 undertook to tell the jury that the defendant owed no duty to the plaintiff to light the stairway in question. That, of course, is not the law.

Further, instructions numbered 34, 35, 36 and 39, were, in our judgment, properly refused.

Counsel for the defendant claims that certain erroneous rulings were made by the trial judge in regard to the admission and rejection of evidence.

The plaintiff in the course of her testimony used, to some extent, a diary which she had kept in her own handwriting, and in which she had written certain matters from day to day as they had taken place. It was perfectly proper for her to use such a diary to refresh her recollection. Further, on one occasion, counsel for the defendant, when asked by the plaintiff if she might refer to her diary, gave his consent.

Objection is made to the refusal by the trial court to permit certain questions to be propounded to one Bishop, an architect. The subject involved was whether the

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construction of the stairways was unusual or in his opinion in good mechanical form. The record shows, however, that in the course of the examination of Bishop he was allowed to, and did state, that the construction of the stairways and banisters was proper.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, J.J. CONCUR.





449 - 28710

ANNIE HANSEN,

Appellee,

vs.

JOHN T. SARACINO,

Appellant.

APPEAL FROM

SUPERIOR COURT,

DOCK COUNTY.

221 I.A. 653

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Annie Hansen, brought suit against the defendant, John T. Saracino, to recover damages for personal injuries sustained by her as the result of an automobile collision and recovered a verdict in the sum of \$8,000.00. There was a remittitur of \$4,000.00 and judgment entered in the sum of \$4,000.00 in favor of the plaintiff.

The plaintiff, a woman about 38 years of age, between three and three thirty P.M. on June 11, 1917, a clear day, was driving a Grant Six, touring car, east on 90th street at about eight miles an hour, and as she drove into the intersection of Cottage Grove Ave. and 90th Street and was making the turn to go north, and was actually going east and northerly, and just after she had crossed the north bound track in Cottage Grove Ave., a taxi-cab belonging to the defendant, driven by one Rechan, a chauffeur for the defendant, going south on the east side of Cottage Grove Ave., at a speed of twenty-five to thirty miles an hour, collided with the automobile of the plaintiff and as a result the plaintiff was seriously injured.



On this appeal counsel for the defendant contends (1) that the judgment is excessive; (2) that it was proper to ask the plaintiff upon cross examination whether she was willing to submit to a physical examination; and (3) that it was error to give instruction No. 26.

(1) As to the judgment being excessive:- Immediately after the accident the plaintiff was taken to a hospital. The evidence of the plaintiff is to the effect that several days after the accident, and after being taken to the hospital, that she recognized Dr. Siemens; that when she awoke she felt great pain around one of her eyes; that it was all bandaged; that her head, eye and shoulder pained her most; that she had to hold her elbow; that she was in the hospital two or three weeks in a private room where she had a special nurse; that Dr. Siemens came two or three times a day; that he gave her massage treatment and used some medicine on her breasts; that there was a large lump, as large as a good sized hen's egg, on her right breast; that there is a small lump there now, deep seated; that the doctor and nurse put on hot applications and gave her medicine and the nurse massaged her constantly; that the massage treatments continued for about three months; that her breast was black for a long time and then it turned purple; that the back of her right shoulder was all scratched or scraped; that she cannot now move the right shoulder; that there is a bad scar over the right temple and a scar on the forehead running down in a central line to the nose; that the depression on the left side of her head is triangular in shape; that she cannot now see well out of her right eye; that her right ear was injured and became swollen and ached; that she has pain





25710

in her right shoulder at the present time and it is somewhat stiff; that she cannot put her hand back; that with her right hand she has not now a very good grip and that she cannot put it back towards the side; that the strength of the arm is impaired; that her breast was discolored for fully five or six weeks and then it was a green color; that that remained for six months; that the lump went down to about the size of a walnut; that it pained her but not all the time; that the right eye became inflamed and is inflamed most of the time; that the sight is impaired and is very poor; that, now, when she gets a little cold an infection in her face sets in; that she uses alcohol and medicine the doctor gave her every night; that she used three gallons of alcohol on her head since the accident; that the pains in her head at times, are very severe; that they sometimes make her face red; sometimes purple and sometimes it swells up on the right side; that the nose on the left side of her face breaks out every once in a while and bleeds; that about a year ago her face was swollen and she discovered she had chills and her right ear and face began to swell until she could not see out of the right eye at all and the left one started to close; that that lasted for nine or ten days; that her ear turned black and got stiff and the pain was so extreme that she was unconscious all night; that she had a nurse with her for nine weeks or more giving her medicine and massaging her back.

The evidence of the physician, Dr. Siemens, is to the effect that he first saw the plaintiff at the hospital a few hours after the accident; that her face and her scalp were all disfigured and covered with blood; that the tissues of the right side of the skull and down to the eyelid were badly torn; that there were several smaller cuts on the cheek and on the





25710 lip; that it took fully two hours to sew her up; that she was semi-conscious at the time and was in great pain for a number of days; that there is an external deformity of the right eye muscle, and still a continued state of inflammation around the cuts which give rise, from time to time, to attacks of headache; that she has shooting pains in her side; that touching the parietal bone causes her pain; that she complained constantly about a pain in her shoulder and breasts; that there is some difference between the right and left breast, the one on the right side being enlarged; that the fleshy part of the breast, the gland and the adjoining muscle, are enlarged, so that you can see the difference with the naked eye; that she was in the hospital three weeks and had a private room and a special nurse; that, in his opinion, the injury around the eye is permanent; that the eyelids seem to be paralyzed; that she is unable to elevate the eyelid; that it has affected the sight of her eye so the vision is not perfect; and has affected the circulation of almost the whole right side of the skull; that he saw her prior to the accident and at that time she was the picture of health; that the injury may have caused some adhesions of the muscles of the arm so as to impair its use; that the injury to her eye is what is called Biosis; that in shaking hands with her now it is obvious that her arm is not in perfect motion; that her permanent injuries are disfigurement of the face, a lack of proper use of her right arm and forearm and that she cannot, normally, extend the right arm.

Inasmuch as the evidence definitely shows that the plaintiff has suffered, as a result of the defendant's negligence, permanent disfigurement of the face, a permanent impairment



of the muscles of the upper right eyelid, permanent impairment of the right arm and permanent injury to one of her breasts, it does not seem reasonable to conclude that a judgment of \$4,000.00 is excessive. Then, too, the four specific injuries, that have just been referred to, do not include all the injury which the plaintiff suffered as the result of the defendant's negligence. Evidently she has suffered great pain and still is in many ways affected and afflicted injuriously, outside of the particular specific results that may be ascribed to the four permanent injuries.

Counsel for the defendant contend that there is no competent evidence of any permanent injuries sustained by the plaintiff outside of the scar upon her face and forehead and the Stosis of the eyelid. Considering all the circumstances, her pain, disfigurement and permanent injuries, we are of the opinion that the judgment of \$4,000.00 as far as the amount is concerned, is fully justified.

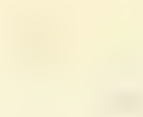
(2) As to the right of counsel for the defendant to ask the plaintiff upon cross-examination whether she was willing to submit to a physical examination:- Counsel for the defendant upon cross-examination of the plaintiff asked first, if the plaintiff was willing to submit to a physical examination; second, if she were willing to submit to a physical examination by a competent physician to be appointed by the court and the examination to be in the presence of her own physician. To each of these questions, counsel for the plaintiff objected and his objections were sustained by the court. We think this ruling was wrong. Jungel v. A.E. & C. Ry. Co., 177 Ill. App. 436; Martant v. Crane Co., 142 Ill. App. 49. While the decisions on this point are not all harmonious,





yet we are of the opinion that the reasoning of the court in the two cases just cited is sound in principle. For if the plaintiff had refused to submit to an examination, that would be a fact proper to be considered by the jury. But counsel for the plaintiff argues that the ruling of the trial judge was not prejudicial to the defendant for the reason that he got the same benefit as if the question had been answered in the negative and the plaintiff had refused to submit to the examination. We think this argument is unsound. It does not appear from the record that this proposition was argued to the jury by plaintiff's counsel. Of course, such argument would be improper if objected to, for when the trial judge held the question improper counsel could not argue to the jury that plaintiff had refused to submit to the examination. If such argument were attempted and objection made, the objection should logically be sustained because the court had previously ruled the question improper and the witness was thereby prevented from answering. Although there was error in the ruling of the court, we think it was not such as would warrant us in disturbing the judgment. For in the instant case the only benefit the defendant could expect from a favorable ruling would be the introduction of some evidence tending to reduce the damages. But since we have already held that the plaintiff was severely and permanently injured and that the judgment was not excessive the error was harmless.

(3) As to the alleged error in giving instruction No. 26 which was given at the request of the plaintiff:-  
The instruction in question undertakes to give the jury the law as to what they shall consider in assessing damages. The words "if you should find plaintiff was injured at the



The first of these is the fact that the  
 system of taxation is not uniform. The  
 rate of tax varies from one district to  
 another, and this is a source of great  
 inconvenience. The second is the fact  
 that the system of taxation is not  
 equitable. The rate of tax is not  
 proportional to the value of the property  
 taxed. The third is the fact that the  
 system of taxation is not efficient. The  
 collection of taxes is a very slow and  
 costly process. The fourth is the fact  
 that the system of taxation is not  
 transparent. The public has no way of  
 knowing how the taxes are collected  
 and how they are spent. The fifth is  
 the fact that the system of taxation is  
 not flexible. The rate of tax is fixed  
 and cannot be changed without a  
 vote of the legislature. The sixth is  
 the fact that the system of taxation is  
 not progressive. The rate of tax is  
 the same for all property, regardless  
 of its value. The seventh is the fact  
 that the system of taxation is not  
 fair. The rate of tax is not based on  
 the ability to pay. The eighth is the  
 fact that the system of taxation is not  
 simple. The public has to deal with a  
 complex system of laws and regulations.  
 The ninth is the fact that the system  
 of taxation is not efficient. The  
 collection of taxes is a very slow and  
 costly process. The tenth is the fact  
 that the system of taxation is not  
 transparent. The public has no way of  
 knowing how the taxes are collected  
 and how they are spent. The eleventh  
 is the fact that the system of taxation  
 is not flexible. The rate of tax is fixed  
 and cannot be changed without a  
 vote of the legislature. The twelfth  
 is the fact that the system of taxation  
 is not progressive. The rate of tax is  
 the same for all property, regardless  
 of its value. The thirteenth is the  
 fact that the system of taxation is not  
 fair. The rate of tax is not based on  
 the ability to pay. The fourteenth is  
 the fact that the system of taxation is  
 not simple. The public has to deal with  
 a complex system of laws and regulations.  
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 collection of taxes is a very slow and  
 costly process. The sixteenth is the  
 fact that the system of taxation is not  
 transparent. The public has no way of  
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 the ability to pay. The twentieth is  
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 not simple. The public has to deal with  
 a complex system of laws and regulations.

time and place alleged\* were superfluous and it may be that the instruction would have been somewhat better without them, still, in our opinion, it would be unreasonable, under the circumstances, to hold that the instruction as given constituted such error as to justify reversal of the judgment.

Finding no error in the record the judgment of the Superior Court is affirmed.

AFFIRMED.

O'CONNOR AND THOMSON J.J. CONCUR.



FREDERICK G. RUFF,

Appellee,

v.

F. C. HARRIS,

Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 653

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On September 3, 1919, the plaintiff, Frederick G. Ruff, began suit in forcible detainer against the defendant, F. C. Harris. On that date summons was issued, and on September 4, 1919, served upon the defendant by leaving a copy with one Mrs. Harris of the family of the defendant.

On September 12, 1919, the cause came on for trial before the court without a jury. There was offered in evidence a written lease dated February 20, 1919, between the plaintiff as lessor and the defendant as lessee, admitting and leasing to the defendant Apartment One on the first floor of the building known as 4148 Clarence avenue, Chicago, to be occupied as a private dwelling from March 1, 1919, until March 30, 1920. The lease provided that the defendant should pay as rent the sum of \$50.00 per month on the first day of each month, in advance, until the termination of the lease.

Paragraph 13 of the lease provided that, if default was made in the payment of any part of the rent, it should be lawful for the plaintiff at his election to declare





the term ended and to re-enter and to re-possess the premises, and that in order to enforce a forfeiture for default it should not be necessary to make a demand or to serve notice on the defendant, notice being expressly waived by the defendant; further, that the nonperformance of any of the covenants of the lease should, at the election of the plaintiff, and without notice or demand, constitute a forfeiture, and at any and all times after such default the defendant should be deemed guilty of the forcible detainer of the premises.

In the course of the trial, it was admitted by counsel for the plaintiff that for each of the months prior to September, 1919, the plaintiff accepted rent after the first of each month. Counsel for the defendant undertook to offer in evidence certain receipts for rent showing that rent was paid for the premises in question as follows: The March rent, paid on February 21, 1919; June rent paid on June 7, 1919; July rent paid July 8, 1919, and August rent paid on August 6, 1919. Objection was made by counsel for the plaintiff to the introduction of the rent receipts and that objection was sustained by the court.

According to the testimony of the plaintiff no demand for the September rent was made. Further, counsel for the defendant undertook to introduce in evidence a conversation between the defendant and the plaintiff, occurring since they entered into the lease, for the purpose of showing that the plaintiff had waived the clause in the lease requiring the rent to be paid on the first of the month without first making a demand therefor. Upon objection to that proffer, the trial court refused to admit the testimony.



The evidence also shows that the defendant purchased a money order for the amount of the September rent on September 4, 1919, and mailed to the plaintiff; and that he received it back, on the morning of the 8th of that month, by special delivery.

The trial court found the defendant, Harris, guilty of unlawfully withholding from the plaintiff the possession of the premises and entered judgment that the plaintiff have and recover from the defendant, Harris, possession of the premises described, and ordered that a writ of restitution issue therefor.

The decision of this court in Bornstein v. Bornstein, et al., (Gen. No. 28641) is decisive of this appeal. In that case we said, "It does not require evidence of such indulgence between lessor and lessee in dealing with each other as to the payment of rent under a written lease which provides that an installment shall be paid on the first of each month, to justify holding that a delay of four days is negligible, and not a substantial breach of the lease."

In the instant case the evidence shows that the defendant sent a money order for the September rent within less than 72 hours of the expiration of the first day of the month, and that, the defendant offered to prove that, in the months of May, June, July and August, that year, the plaintiff accepted the rents which were paid from five to seven days after the first day of each of those months. We are of the opinion that the trial court erred in refusing to permit the introduction of the proffered receipts, and, further, in refusing to permit the defendant to testify to any con-





variation with the plaintiff which might tend to show that the plaintiff had waived that clause in the lease which provided that the rent should be paid on the first of the month. Owing to the errors mentioned, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR and THOMSON, J.J. CONCUR.



291 - 25549

CHICAGO WOOD & COAL COMPANY,  
a corp..

Appellee.

v.

SOUTHERN COAL, COKE & MINING  
COMPANY, a corp..

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 653

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought suit against defendant to recover  
damages for breach of contract. There was a verdict and judg-  
ment in plaintiff's favor for \$3500 to reverse which defendant  
prosecutes this appeal.

Plaintiff owned and operated a coal yard in Chicago  
and on August 23, 1916, entered into a contract with defendant,  
who was the owner and operator of certain coal mines in south-  
ern Illinois, whereby the plaintiff was to purchase from de-  
fendant a certain quantity of coal to be delivered between  
September 1, 1916, and March 31, 1917. During practically  
the entire period covered by the contract defendant failed to  
ship the required quantity of coal and on March 31, 1917, de-  
fendant had shipped but 52 cars of the 100 cars ordered by the  
plaintiff under the contract. During the life of the contract  
the price of coal had advanced and plaintiff brought this suit  
to recover the difference between the market price and the con-  
tract price of the 100 cars which defendant had failed to ship.  
The defense was that plaintiff was in default in failing to pay



Diagram illustrating the relationship between the variables X and Y.

Figure 1

The diagram shows a series of data points plotted on a coordinate system. The horizontal axis is labeled 'X' and the vertical axis is labeled 'Y'. The data points are connected by a line, showing a general upward trend. The line starts at a low value of X and Y, rises to a peak, and then falls to a low value of X and Y. The line is labeled '1910' at its starting point and '2100' at its ending point. There are also labels for '1915', '1920', '1925', '1930', '1935', '1940', '1945', '1950', '1955', '1960', '1965', '1970', '1975', '1980', '1985', '1990', '1995', '2000', '2005', '2010', '2015', '2020', '2025', '2030', '2035', '2040', '2045', '2050', '2055', '2060', '2065', '2070', '2075', '2080', '2085', '2090', '2095'.

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The diagram shows a series of data points plotted on a coordinate system. The horizontal axis is labeled 'X' and the vertical axis is labeled 'Y'. The data points are connected by a line, showing a general upward trend. The line starts at a low value of X and Y, rises to a peak, and then falls to a low value of X and Y. The line is labeled '1910' at its starting point and '2100' at its ending point. There are also labels for '1915', '1920', '1925', '1930', '1935', '1940', '1945', '1950', '1955', '1960', '1965', '1970', '1975', '1980', '1985', '1990', '1995', '2000', '2005', '2010', '2015', '2020', '2025', '2030', '2035', '2040', '2045', '2050', '2055', '2060', '2065', '2070', '2075', '2080', '2085', '2090', '2095'.

for the coal shipped during the month of March, 1917, and it is urged that where both parties are in default neither of them can recover on the contract and, therefore, plaintiff cannot recover in the instant case. A further defense was that defendant was not at fault in failing to ship the 108 cars ordered for the reason that there was a shortage of cars, trouble at the mine on account of machinery being out of working order and other conditions; that under the terms of the contract defendant was not required to furnish coal when it was prevented from doing so by causes beyond its control, and that the car shortage and the trouble at the mines were beyond its control.

The contract provided that plaintiff was to pay on or before the fifteenth day of each month for all coal shipped prior to the twenty-fifth of the preceding month. It was stipulated that plaintiff was entitled to 100 cars of coal and that but 52 cars had been furnished and that plaintiff had paid promptly for all coal delivered except \$302.36 for 18 cars which were delivered in March prior to the twenty-fifth of that month.

Defendant contends that even if it was in default in failing to ship the 108 cars, yet since plaintiff was also in default in failing to pay the \$302.36 on or before April 15, 1917, for the coal delivered during the first 14 days of March, no recovery can be had; that it is the law that before plaintiff can recover damages for a breach of the contract it must allege and prove that at the time the suit was brought it was not in default, and that where both parties are in default it makes no difference which party first breached the contract. It is argued that plaintiff in order to show that





it was not in default should have paid the \$862.86 on or before April 15, or that it should have made a distinct offer to set off that amount against the damages it now claims. In reply to this, plaintiff's position is that the legal proposition contended for by defendant is not applicable where the contract has terminated, as in the instant case all of the coal was to be delivered by March 31, 1917. For the purposes of this suit we shall assume that the law is as contended for by the defendant. And in fact, that is the theory on which the case was tried, for the court at the request of defendant expressly instructed the jury that before the plaintiff could recover it must prove by a preponderance of the evidence that at or before the suit was commenced it had performed the contract on its part; that under the contract plaintiff was required to pay for the coal on the date specified, and unless plaintiff had proven by a preponderance of the evidence that it had on or prior to April 15 paid for the coal delivered or had made a distinct offer to set off the amount due against the damages it claimed, then the plaintiff could not recover. So that it appears that the case was tried on the theory of law contended for by defendant. But defendant argues that there is no evidence tending to show that plaintiff made a distinct offer to set off the \$862.86 against its damages. Defendant having induced the court to give the instruction just referred to is in no position now to argue that there was no evidence to support it for the instruction would have been wrong unless there was some evidence tending to show that plaintiff had made the offer of set-off. However, we think there was evidence tending to show that plaintiff did make the offer of set-off. Plaintiff's president, Mr. Centerfeicher, testified that at the request of defendant's president

The first of these is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The second is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The third is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The fourth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The fifth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The sixth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The seventh is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The eighth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The ninth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The tenth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood.

he called on the latter in the Steger Building, Chicago, on April 4, 1917, and that at that time he saw defendant's president, Mr. Kavanaugh, and they discussed the question of defendant's failure to ship all the coal ordered; that at that conversation the witness told Mr. Kavanaugh that he had been overcharged two cents per ton for the coal shipped after the first of the year and that Mr. Kavanaugh agreed to look into and adjust the matter; that no one was present at this conference except the witness and Mr. Kavanaugh. He further testified that afterwards, sometime in May, he again called at the same place and saw Mr. Kavanaugh; that at that time the latter offered to deliver 50 cars of coal at the contract price; that the witness thought he was entitled to about 100 cars and at that time expressly offered to set off the \$808.86 against the plaintiff's damages; that no agreement was reached. For the defendant Mr. Kavanaugh testified that he lived in St. Louis and came to Chicago to see plaintiff's president; that by appointment they met at the Steger Building where defendant had an office; that at that time the witness told plaintiff's president that defendant was not in default in failing to ship the coal; that its failure to do was the result of causes beyond its control, but that it desired to treat its customers right and would voluntarily deliver to plaintiff 50 additional cars of coal at the contract price; that plaintiff's president thought it was entitled to 100 cars instead of 50; that the witness suggested that plaintiff's president think the matter over and later advise him; that nothing was said at that time, which was April 4, 1917, about the matter of any set-off, and that the witness never saw plaintiff's president at any other time. Two other witnesses testified that they were at this meeting and corroborated Mr. Kavanaugh's testimony. There is a clear





conflict in this evidence and the jury might believe that although plaintiff's president testified that he discussed the question of set-off in May he was mistaken, and that as a matter of fact it was discussed in April, or they might have found that there was a second conversation, as plaintiff's president testified, and that Mr. Kavanaugh and the other witnesses were mistaken. In view of the evidence on this point we are unable to say that the finding of the jury that plaintiff offered to set off the \$808.86 against its damages is against the manifest weight of the evidence. Moreover, there is another reason why defendant cannot urge this point successfully for the court at defendant's request submitted the following special interrogatory to the jury: "Did the plaintiff make to the defendant a distinct offer to set off the money due for coal shipped under the contract between March 1, 1917, and March 28, 1917, against any damages which it claimed to be due to it by reason of the failure to deliver a portion of the coal called for under the terms of the contract sued upon?" The jury answered this in the affirmative. After having submitted this interrogatory the defendant will not now be permitted to say that the finding of the jury on this point was of no effect because the interrogatory did not ask whether the offer of set-off was made on or before April 15, 1917. The only interrogatory proper in such case is one that if answered would be controlling. See 79, Ch. 110 R.S.: U.S.N.E. Ry. Co. v. Paulsmy, 139 Ill. 138. Defendant having submitted the interrogatory cannot now urge that the finding is not controlling.

Defendant also contends that before plaintiff can recover it must prove that it was ready and willing to perform the contract on its part and that the proof showed that plain-



tiff was not ready and willing to perform but on the contrary refused to pay for the March shipments. The jury, at the request of the defendant, were instructed on this point in accordance with the defendant's contention. They found against the defendant, and properly so since we have held that their finding that the offer of set-off was made in apt time, should not be disturbed.

Defendant further contends that it was not in default in failing to deliver all the coal requested under the contract for the reason that the contract, by its terms, excused defendant from performance when prevented by causes beyond its control, and that this necessarily included car shortages, necessary shut-downs and overcharges, and that in such case defendant was only required under the law and under the contract to deliver to plaintiff its pro-rate share of all the coal it shipped, and that the evidence shows that on account of a shortage of cars it was unable to fill a number of its contracts, but that it pro-rated the coal it was able to ship among its several customers. We have recently considered this question in the case of Krug Coal Company v. C. S. Blake Co., Appellate Court, First District, Sen. No. 34782, and there held that where there was a similar provision in the contract the seller was required to deliver to its customers only their proportionate share of the coal shipped when the total amount so shipped was insufficient to fill all contracts. But plaintiff's position is that defendant's failure to ship the 108 cars of coal was not caused by any shortage of cars or on account of any trouble at the mines, but was caused solely by the fact that defendant sold its product for more money to other and subsequent purchasers. Defendant offered evidence tending to sustain its contention that there





was a shortage of cars and trouble at its mine that prevented it from delivering all of the coal plaintiff requested under the contract. On the other hand plaintiff offered evidence tending to sustain its position. The jury were told that if there was a shortage of cars or trouble at the mines which prevented delivery the defendant was thereby excused from delivering all the coal plaintiff ordered and that in such case defendant was only required to give plaintiff its pro rata share. We cannot say that the verdict of the jury is against the manifest weight of the evidence.

Complaint is also made that the trial court improperly admitted evidence, over objection, which evidence was a tabulated statement prepared by plaintiff from defendant's records of shipments of coal made by defendant during the period covered by the contract. We think there was no error in this as the statement was compiled from defendant's own records and if it was inaccurate, the inaccuracy could have been easily pointed out. In this connection, the court admitted a trade journal showing the market prices of coal, during the period covered by the contract and it is claimed that this was error. A number of witnesses for plaintiff testified that this journal was reliable and that it accurately gave the prices of coal for the dates mentioned in it and that such prices as given were acted upon and accepted by coal dealers generally. On behalf of defendant witnesses testified that the prices mentioned in this journal were usually higher than the market prices. In these circumstances we think the accuracy of these figures was a question of fact for the jury.

Complaint is also made to the giving of instructions





Nos. 1, 10, 11 and 13 at the request of plaintiff. Instruction No. 1 told the jury that it was agreed that defendant was short 4860 tons of coal and that "plaintiff is entitled to recover the difference between the average contract price and the average market price" provided plaintiff was ready, able and willing to receive and pay for the coal, and provided further that defendant was not excused from performance by reason of a shortage of cars or other conditions beyond its control. The objection to this is that some coal was to come from defendant's mine at New Baden and some from its other mine at Shiloh, and that the instruction makes no distinction between the quantity to come from each mine. Since the jury found that defendant's failure to comply with the contract was not due to a shortage of cars, or other conditions beyond its control, we think there is no merit in the point. Instruction No. 10 told the jury that defendant's contention was that on account of its inability to procure a sufficient number of the proper kind of cars it was compelled to deliver mine run coal and could not prepare egg, nut and lump coal called for by the contract; that if they believed from the evidence that plaintiff offered to accept mine run coal as a substitute and defendant would not furnish the mine run coal, then defendant could not interpose as a defense a shortage of cars or shut down at the mines. Instruction No. 11 was to the effect that if the jury found from the evidence that defendant mined mine run coal instead of nut, egg and lump coal when it could have prepared the latter kinds of coal, consistently with the practical operation of its mines, it would not be excused from performance of its contract by a shortage of cars. The argument is that the jury were, in effect, told by instruction No. 10 that plaintiff could change its contract from nut, egg



and lump coal to mine run coal when as a matter of fact plaintiff had no such right, and that both these instructions wholly ignored the existence of subargues "against equipment". Witnesses on behalf of plaintiff testified that at numerous times, when plaintiff was unable to get the coal ordered, it requested defendant to furnish mine run coal instead of egg, nut and lump, but that defendant refused to do so. On the other hand, Mr. Ravenough, the president of defendant testified that he offered to deliver mine run coal but that plaintiff refused to accept it. Under these circumstances we think defendant was not prejudiced in any way by instructions 10 and 11. Instruction No. 15 told the jury, in effect, that in arriving at the market price, they were entitled to take the market price for each day of the week or month and strike an average for the period. It is said this instruction was prejudicial for two reasons: that it told the jury to assess damages as there would be no reason for determining the market price unless they found for plaintiff. We think there is no merit in this point and that the jury were not misled as they were very carefully instructed on the rights of the parties.

It is also contended that the court erred in refusing to give, as requested, refused instructions No. 1, 2, and 3. We will not stop to discuss these instructions, but it will suffice to say that we think that the substance of each was fully covered by other instructions given. It is also argued that the court erroneously modified instructions Nos. 11 and 12 offered by the defendant. These instructions told the jury in substance that defendant agreed to ship plaintiff a certain quantity of coal from its Shiloh mine and from its other mine and that if it was prevented from making deliveries of the coal





from the respective mines by causes beyond its control, then defendant would be released from making deliveries at all. The court struck out that portion of the instructions which told the jury that in such case defendant would not be obliged to produce coal from other sources to make such deliveries to plaintiff. We think the modification was warranted. If a certain kind of coal was to come from the Shiloh mine and by reason of trouble there all of that kind of coal could not be delivered, this would relieve defendant from liability so far as that particular kind of coal was concerned, and there would be no reason for the qualification which defendant inserted in the instruction and which the court struck out.

It is also argued that the verdict is excessive. It was stipulated that defendant was short in its deliveries 4840 tons of coal and the jury figured the difference between the market price and the contract price at 72¢ per ton giving a verdict for \$3500. We think this was well within range of the prices testified to by the witnesses, and in these circumstances we should not disturb the finding of the jury.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.



1875/

322 - 23861

JOSEPH BARLOTHY,

Appellee,

v.

ILLINOIS INTERIOR FINISH CO.,  
a corp..

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 653

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff hired an automobile truck to the defendant and while the latter was using it the truck collided with a street car damaging the truck. Plaintiff brought suit to recover for such damage. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$300 to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff was in the garage business and on July 27 rented to the defendant an automobile truck for \$6.00 per day; that defendant took the truck and on the afternoon of the third day defendant's chauffeur was driving south on Cottage Grove Avenue with a load of merchandise. The truck was straddling the east rail of the west or southbound car track. Approaching from the opposite direction was a street car on the east or northbound track. The street car and the truck were each traveling at about fifteen miles per hour. When they were from 15 to 30 feet apart the chauffeur



attempted to turn the truck to the west so as to pass the street car, but something gave way in the steering apparatus and it turned to the east and collided with the street car and was damaged.

Defendant's position, as stated by its counsel, is that "No evidence was introduced by appellee to show that the appellant or its driver was guilty of any negligence in the use or care of the truck in question \* \* \* The record discloses absolutely no evidence showing any negligence on the part of appellant in the use or care of the truck when on, by any stretch of the imagination, he considered the proximate cause of the accident." This is not a correct theory of the case. Plaintiff was not required to show that the defendant or its driver was guilty of any negligence in the use of the truck, for when he showed that he delivered the truck in good condition and it was returned to him in a damaged condition the law will presume negligence on the part of the defendant and the burden is upon him to show that he exercised ordinary care in the use of the truck, this being a bailment for the mutual benefit of the parties. Funkhouser v. Hensley, 48 Ill. 38. But the defendant also contends that the evidence discloses that it exercised reasonable care in the use of the truck and that the accident was caused by the defective steering apparatus. The chauffeur testified that he had been engaged in driving automobiles for eight or nine years and that he also worked in a garage; that at the time in question he had a load of book-cases in the truck; that he had driven the truck for defendant from the time it was hired until the accident; that it had been put to no extraordinary use and that there had been no sharp turns or accidents up to the time of the collision with the street car; that just prior to the ac-





cident he was driving south in Cottage Grove avenue between 50th and 51st streets at the rate of 12 to 15 miles per hour; that "all of a sudden I felt the right front wheel give way under me and put on the brakes and clutch at the same time and she shot right across the street into the street car"; that he was straddling the east rail of the west or southbound street car track; that the street was paved with brick and that "it is rough off from the brick"; that it was smooth riding in the track and that it was quite an old brick pavement; that the right front wheel went down; that he started to make a natural turn but the car did not respond; that at the time he felt the right front wheel go down "I was over the rails \* \* \* I had one wheel on the outside rail"; that the front axle went down on the right hand side. A witness, who was on the front platform of the street car, saw the collision and testified that he did not notice anything wrong with the automobile or that any wheel came off of it, but that he saw the chauffeur turning the steering wheel. The motorman testified that he noticed the truck when it was about 15 feet from the street car; that he noticed it particularly on account of the lead of frames in the truck and that it was straddling the inside rail pretty close to the car; "I was wondering if he was going to turn out a little bit away from the car and just at that time I noticed the wheels of the truck beginning to wobble first one way and then the other, and by that time he made a quick turn and ran into the corner of the car"; that he noticed the chauffeur trying to turn the steering wheel to the right but the truck did not respond. In reply to questions put to the witness by the court, he testified that he did not see anything break and that he did not notice the axle drop down and did not see



the truck collapse in front.

This is the substance of the evidence and from a careful consideration of the record we are unable to say that the finding of the trial court that defendant had not shown that it exercised ordinary care in the use of the truck while it was in its possession is against the manifest weight of the evidence. It was incumbent on the defendant to show that during the two and one-half days it was using the truck it had not overloaded it, ran it unreasonably over rough streets, or had used it in any manner that might indicate failure to exercise ordinary care. It was also incumbent on the defendant to show all of the circumstances surrounding the accident. It should have gone forward and shown the nature of the payment at the place in question to show that the wheels did not drop into any rut or that there was no undue roughness crossing the rails. The burden was on the defendant to show that it exercised ordinary care in the use of the truck at all times and the finding of the trial court that the evidence failed to show this is not against the manifest weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

ASTORIA.





347 - 28607

AMERICAN STEEL SPRING CO.,  
a corp.,

Appellant,

v.

HILL & SCHLES COAL CO.,  
a corp.,

Appellee.

SERIAL FROM

UNRECORDED COURT

OF CHICAGO.

221 I.A. 653

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by reason of the breach of a warranty of a quantity of coal sold and delivered. The defendant interposed a set-off for the price of the coal. The court directed the jury to find against the plaintiff and in favor of defendant for the amount of its set-off, \$1816.43, to reverse when plaintiff prosecutes this appeal.

The record discloses that plaintiff operated a manufacturing plant in Chicago and purchased nine cars of coal from defendant. The coal was delivered and placed in plaintiff's coal bin near its factory. The coal bin was four fourteen to eighteen feet deep and was filled with the coal. A few weeks after the coal was placed in the bin it was discovered that it was burning and despite all efforts it was entirely consumed. Plaintiff's contention was that the fire was the result of spontaneous combustion, and that the defendant, at the time the coal was sold, warranted that it would not catch fire by spontaneous combustion and, therefore, there was a breach of warranty.

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in determining whether the court was right in directing the jury to find for defendant, all of the evidence is to be construed in its most favorable aspect to plaintiff, and all inferences are to be resolved in its favor. The question of the preponderance of the evidence does not arise at all. Levinson v. Kaplan, Appellate Court, First District, Dec. No. 38637; Chambers v. T. St. L. & W. R. R. Co., 260 Ill. 589; Libby. McNeill & Libby v. Cook, 222 Ill. 206.

The evidence tends to show that Mr. Fry, agent of defendant coal company, called on plaintiff on one or two occasions to sell it coal, and that he again called on August 1, 1918, at plaintiff's place of business for the same purpose. Mr. Benjamin, president of plaintiff, testified that at that time he told Mr. Fry that he wanted Franklin County coal; that Fry stated defendant did not have any Franklin County coal but that it had Standard District coal. Benjamin further testified that he told Fry that plaintiff used Franklin County coal the year before and had no trouble with it because of fire caused by spontaneous combustion; that the witness had, prior to that time, conducted a business in Iowa and there had trouble on account of fire in the coal supply caused by spontaneous combustion; that he showed Fry plaintiff's coal mine and the nature of its plant, and stated that plaintiff could not have any trouble with coal that would catch fire from spontaneous combustion and that Fry thereupon said, "I assure you you will have no trouble with the coal. You say this coal (Franklin County) has been out there a year and our coal is as good as the other coal"; that thereupon plaintiff purchased from defendant the coal in question; that afterwards the coal was delivered and within a short time thereafter it was seen to be burning.

The first part of the paper is devoted to a general discussion of the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system has a solution for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the matrix  $A$  is nonsingular. In this case the solution is unique and can be found by the method of least squares.

In the second part of the paper the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$  is considered. It is shown that the system has a solution for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the matrix  $A$  is nonsingular. In this case the solution is unique and can be found by the method of least squares.

In the third part of the paper the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$  is considered. It is shown that the system has a solution for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the matrix  $A$  is nonsingular. In this case the solution is unique and can be found by the method of least squares.

In the fourth part of the paper the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$  is considered. It is shown that the system has a solution for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the matrix  $A$  is nonsingular. In this case the solution is unique and can be found by the method of least squares.



and that plaintiff notified defendant of this fact and the latter sent out a representative who saw the coal burning. There was other evidence tending to show that standard district coal contains more sulphur than Franklin County coal and was more apt to ignite than the latter. Although there was some evidence offered by defendant tending to dispute some of the matters contended for by plaintiff, we must assume since there was a directed verdict that the testimony offered on behalf of plaintiff was true.

We think the statement made by Fry to Benjamin on August 2 was insufficient to constitute a warranty that the coal would not ignite by spontaneous combustion. We are also of the opinion that the evidence tending to show that the coal was ignited by spontaneous combustion was insufficient to show that such was the cause of the fire. The substance of the testimony on this point was that some of plaintiff's employees saw smoke coming from the coal bin and from that time on the coal continued to burn until it was entirely consumed. A witness produced by plaintiff testified as an expert that spontaneous combustion was caused by "oxidation of the brittle particles of coal by the absorption of oxygen, and that oxidation was caused by absorption of oxygen from the air; that the presence of sulphur is material in oxidation because it has a tendency to break the coal into finer particles, and oxidation is more rapid in the finer particles; that the presence of sulphur in coal has a tendency to break up the coal. That Franklin County coal has from one per cent to two and one-half per cent sulphur, and St. Clair County (standard district) has from three to five per cent." Q. So the more sulphur there is in the coal, the more or greater the tendency to ignite? A. The





greater the tendency for the coal to break up into smaller particles, for that then exposes the small particles of the coal to the action of the oxygen. Q. Will it. Chair County coal stored in large quantities, say four hundred tons in a bin, walled on two sides, after a certain time, ignite? A. Yes, sir." We think it clear that this was insufficient to make out a prima facie case that the coal in question ignited by spontaneous combustion.

But even if we assume that the evidence offered established the fact that Fry did warrant that the coal would not catch fire by spontaneous combustion and that it was further established that the coal in question was so ignited, the plaintiff did not make out a prima facie case for the reason that there was no evidence or offer of evidence tending to show that Fry had express authority from defendant to warrant the coal, nor was there any evidence offered tending to show that there was custom in the sale of coal by agents to warrant that coal would not ignite by spontaneous combustion, and in the absence of any evidence tending to prove either of these facts there was a failure to make out a case. A general agent to sell coal has no implied authority to warrant that it will not ignite by spontaneous combustion and whoever relies on such a warranty must either show express authority to make the warranty or a custom to give such a warranty in making such sales before the principal will be bound. Herring v. Rogers, 62 Ala. 180; Dunham v. Salmon, 130 Wis. 164; Irish Grocery Co. v. Peltier, 139 Ala. 358; Federal Rubber Bfg. Co. v. Flow City Garage, 204 Ill. App. 126; Benjamin on Sales, sec. 684; Central Commercial Co. v. Loken Co., 173 Ill. App. 47; Ido v. Bredie, 186 Ill. App. 479. See also Braun v. Ross & Co., 187 Ill. 263; Klauer v.



Salusnet Fire Clng. Co., 105 Ill. 305.

In the Herring case Skagge brought an action against Herring and others to recover damages for the breach of a warranty of a safe sold by defendants to him. The evidence tended to show that Skagge purchased from an agent of the defendants an iron safe which the agent warranted to be burglar proof; that after the safe was delivered plaintiff put his valuables in it which were later abstracted by burglars who cut through the safe, the walls of the safe being very thin and not as represented. The court held that no recovery could be had and said (p.196): "The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes, to warrant them as burglar proof. Either the express authority or the authority implied from such proven custom would constitute the act of the agent the act of the principal; but the law does not imply the authority from the fact that Stewart who conducted the sale, was a general agent."

In the Laurelton case an agent of plaintiffs sold a stallion to the defendants making certain oral warranties. Plaintiffs brought suit for the purchase price of the stallion and the defendants contended there was a breach of warranty by reason of which they suffered damage. The court, speaking by Mr. Justice Winslow, in holding that the defense was not established, said (p.171): "The sale was made by an agent, and it is settled in this court that in such case the vendee, in order to enforce an alleged express warranty claimed to have been made by the agent, must prove either that the agent had express authority from his principal to make it, or that such sales are usually attended

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of growth and change. It begins with the first settlers who came to the continent, and it ends with the present day. The story is full of interesting events and people. It shows how the country grew from a small colony to a great nation. It also shows how the people of the United States have worked together to make the country a better place to live in. The history of the United States is a story of hope and achievement. It is a story that inspires us to work for a better future.

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with such a warranty."

In the Lynn Grocery Co. case, which was an action for the purchase price of fish sold, it was held that the plea of the defendants, who were wholesale merchants, to the effect that plaintiff's traveling salesman represented that the fish would keep sound for twelve months, but which plea contained no averment to show that the traveling salesman had any such authority, was bad. The court there said, (p.36v): "It does not follow from the mere fact that Bennett was plaintiff's traveling salesman and had authority to take defendant's order for the fish that he had authority to bind plaintiffs by warranting in their behalf, that the fish would keep sound for twelve months, or for three months, from the time they were packed. Herring v. Skaggs, 52 Ala. 136."

In the Federal Rubber Bldg. Co. case it was held that an agent in making a sale of goods is authorized to do whatever is usual in carrying out the object of his agency, and if a warranty of the goods is usual, he may give it in order to effect a sale and thereby bind his principal. It is there further held that whether the warranty is usually given is a question of fact.

In the instant case there was no evidence offered tending to show that it was usual for coal salesmen to give the kind of warranty in question, and while it might be implied that an agent to sell has authority to give certain kinds of warranties, this implied authority certainly could not apply to such an unusual warranty as the one contended for here.

In the Central Commercial Co. case where it was contended that the agent had authority to warrant that a certain



Flux was as good as another brand, it was held that this was not established by merely proving the agency. And in Ada v. Arndie, the court said, "The general rule is, as to contracts including sales, that the agent is authorized to do whatever is usual to carry out the subject of his agency and it is a question for the jury to determine what is usual.", citing sec. 624, Benjamin on Sales.

In the instant case, there being no evidence that it was usual for coal salesmen, in taking orders for coal, to warrant that it would not ignite by spontaneous combustion, plaintiff failed to make out a case and the court properly directed a verdict.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

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366 - 25620

SOPHIA LUNDENIST,

Appellee,

v.

CHICAGO RAILWAY COMPANY,  
et al, doing business under  
the name and style of the  
CHICAGO SOUTHWEST LINE,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 654

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought suit against defendants to  
recover damages for personal injuries sustained by her.  
There was a verdict in her favor for \$5500 and on a motion  
for a new trial a rescript of \$1,000 was entered and judg-  
ment rendered on the verdict for \$4500, to reverse which  
defendants prosecute this appeal.

The record discloses that plaintiff, who was over  
80 years old, boarded one of defendants' cars and after she  
had ridden for a considerable distance it stopped at 79th  
street and Cole's avenue, which was a regular stopping place;  
for receiving and discharging passengers; that as she was  
alighting from the car it started up and she fell to the  
ground and was severely injured. It was the theory of the  
plaintiff that the car was not stopped a sufficient length  
of time to enable her to alight from the car. On the other  
hand, defendants' contention was that plaintiff remained in  
her seat after the car stopped and did not proceed to alight



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therefrom until at or about the time it started again.

Defendants contend that there is no liability on plaintiff's own version of the case because, on the undisputed facts they did not know and in the exercise of the degree of care required of them were not obliged to know that plaintiff intended to alight from the car. If plaintiff was exercising ordinary care and diligence for her own safety in alighting from the car, the defendants would be liable if they knew or should have known that she was attempting to alight. Of course, they would not be liable unless they knew either actually or constructively that plaintiff was alighting from the car. North Chicago Street Ry. Co. v. Cook, 145 Ill. 581. The defendants, carriers of passengers, are not insurers of life or safety of their passengers, but are required to exercise "the utmost or highest degree of care, skill and diligence for the safety of the passengers that is consistent with the mode of conveyance employed." North Chicago Street Ry. Co. v. Cook, supra. Whether, in the case before us, the defendants exercised the degree of care which the law imposed upon them is the question to be determined.

The evidence tends to show that although plaintiff was over 80 years old she was very active and could get off street cars "very quickly, spry, like a young girl"; that she was going from her home to visit her daughter and that she had ridden on defendants' cars for this purpose on a number of prior occasions. She knew that the car, on which she rode west in 79th street, turned north in Coles avenue and that it stopped to discharge and receive passengers at that point. The car was of the pay-as-you-enter type and when

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it reached the regular stopping place at the intersection of the two streets the conductor, who was in his proper place on the rear platform, got off and went forward about five feet in front of the car to lift the switch so that the car would turn north in Coles avenue; that the plaintiff attempted to alight from the back platform and as she did so she fell or was thrown to the ground and severely injured. No complaint is made that the damages awarded are excessive for the injuries sustained if the defendants are liable at all.

Plaintiff was sitting on the north rear seat which runs lengthwise of the car and which was just inside the rear exit door. She could not speak the English language but testified through an interpreter that when car started to get off she took hold of the iron bar and stepped down on the last step when the car started up and she fell or was thrown to the ground; that she could not state whether the conductor got off the car while it was standing still but that she "got out before he got off"; that the conductor jumped off; that when he did so she stood up to leave the car and when she walked through the door the conductor was right below her and that he then jumped off. Anderson, a witness for the plaintiff, testified that he was a passenger on the car and that when it stopped he got off the front end; that at that time the conductor was in front of the car in the act of raising the switch; that the car started forward and after it had run 10 or 15 feet it was again stopped and he saw plaintiff lying on the ground about opposite the rear step of the car. The witness Havak testified for plaintiff that before the car arrived at the stopping place he was in the street waiting to board it and that when it stopped he got on;

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that he did not see the conductor - "the conductor is all the time raising the switch"; that when the witness got on the back platform the plaintiff was also on the back platform; that the car was started and after it had proceeded 10 or 15 feet plaintiff, who was in the act of alighting, fell or was thrown to the ground and injured. The evidence further shows that there were only about 15 passengers on the car.

For the defendant, the conductor testified that plaintiff did not notify him that she desired to get off the car when it reached Coler avenue; that "as soon as the car stopped he looked to see if anyone was getting up to leave the car and that he saw no one"; that everybody was seated and that he then got off and walked forward at an ordinary gait to the switch which was about six feet in front of the car; that he then looked back to see if anyone was getting off but saw no one attempting to alight from the car; that he lifted up the lever of the switch and again looked east toward the rear of the car and at that time there was nobody on the rear step; that the car then started forward slowly and after it had gone about halfway around the switch - 25 feet, plaintiff stepped down and was injured; that the car was moving when she stepped off and that the witness notified the motorman to stop the car which was done in four or five feet, and that he then went to plaintiff's assistance. The motorman, who at the time of the trial was no longer in defendant's employ, testified that as soon as he stopped the car a passenger who was on the front platform asked him to open the door so that he could get off; that the witness did so and the passenger got off; that afterwards the conductor was at the switch in front of the car and



then the witness looked back through the car to see if anyone was getting off; that he saw no one attempting to leave the car; that the conductor then signalled to him to go ahead which he did, and after the car had gone about 25 feet the conductor signalled him to stop the car which he did within four or five feet. He further testified that the car was standing still at the time the conductor got off the back platform and that the conductor walked to the switch at a slow walk. This was substantially all of the evidence tending to show how plaintiff was injured. The evidence also showed that the day in question was a nice sunny day and that the accident happened at about 2:30 o'clock in the afternoon.

The jury were instructed that if they found from the evidence plaintiff attempted to and did alight from the car after it started up and while it was in motion, plaintiff could not recover and the verdict should be for the defendants. Since the jury found for plaintiff it must be presumed they found that she did not attempt to alight from the car after it started up. The evidence tended to show that she was using due diligence in getting off the car. Witnesses for defendants testified to certain circumstances which would tend to sustain the contrary. There is testimony that the conductor did not get off the back platform until the car stopped and then walked the length of the car, 50 feet, and 6 feet beyond to the switch. But there was also other testimony that tended to show that when the passenger got off the front platform, which he did as soon as the car stopped, the conductor was already at the switch. This might reasonably have lead the jury to believe that the car was not stopped a sufficient length of time to permit the plaintiff to alight. Upon a careful consideration of all the evidence





we think it clear that all reasonable minds would not reach the conclusion that defendants stopped the car a reasonable length of time to permit plaintiff to alight, and, therefore, the case was a proper one for the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206. Nor do we think the finding of the jury is against the manifest weight of the evidence.

Complaint is made to the giving of instruction 7 submitted by plaintiff. This instruction was as follows: "If you believe from the evidence, under these instructions, that the plaintiff was alighting from the street car in question at the time and place in question, while said car was standing still, then it became, and was, the duty of the defendants to exercise the highest degree of care reasonably consistent with the mode of conveyance adopted and used by defendants and the practical operation of said railroad, to stop said street car a reasonable length of time to permit the plaintiff, in the exercise of ordinary care, to alight from said street car safely and not to start said street car within such reasonable time." Several objections are urged to this instruction, the principal one of which is that it omitted the element of knowledge, actual or constructive, on the part of defendants, that plaintiff proposed to alight from the car. In reply plaintiff relies on the case of Grauf v. Chicago City Ry. Co., 235 Ill. 268, where substantially the same instruction was held to be unobjectionable. But in that case the criticism now urged was not made or considered. In the Grauf case the objection was that the instruction treated the question of negligence as one of law when it should have been treated as one of fact. If instruction 7 directed a verdict, it might be reversibly erroneous. It does not, however, direct a verdict, and by instruc-



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tion 22 the jury were told that defendants would not be liable unless, in the exercise of the degree of care which the law imposed upon them they could have foreseen and prevented the injury to plaintiff. We think this obviates the objection made. We have considered the other objections made to this instruction but think none of them would warrant us in disturbing the verdict of the jury.

It is also argued that instruction 1 submitted on behalf of plaintiff was erroneous and should not have been given. This instruction told the jury that "Under these instructions, you as the jurors, are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to their testimony." A number of Appellate Court cases are cited in support of defendants' contention but upon an examination of them it will be found that the instructions were not the same as the one before us. A similar instruction, however, was approved by our Supreme Court in the case of T. & A. Ry. Co. v. Fisher, 141 Ill. 614, and an examination of the authorities fails to show that the opinion in that case has been at all departed from. The reasoning in that case is applicable to the case before us.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. CONCURS

THOMSON, J. DISSENTING:

I am unable to concur in the foregoing opinion.

The witness Anderson, testifying for the plaintiff, said he got off the car at the front end, when it was standing



still. It is apparent from the record that he had time to walk from the car to the sidewalk and had "started to walk home" when he heard the plaintiff's outcry as she fell. The witness Novak, testifying for the plaintiff, said he got on the car at the rear platform when it was standing still and that then the car started and the plaintiff got off and that she got off backwards. The latter fact is demonstrated by the fact that the car was going west and the plaintiff got off on the north side of the car and fell on her right side.

When the car came to a stop and these two passengers boarded and left the car as indicated, the rear of the car was 55 feet from the switch. When the plaintiff stepped from the car, according to the conductor's testimony, he was holding the switch lever and "was about in the center of the car," so that the rear of the car was then 25 feet from the switch and the car had moved 30 feet from the point at which it had stopped to permit passengers to get off or get on. The testimony of the motorman, who was not in the employ of the defendant at the time of the trial, was to the same effect. It thus seems to be clearly established by the evidence that the unfortunate injury suffered by this plaintiff was due solely to the fact that after the car had come to a stop and had so remained for a length of time sufficient to enable a passenger to board the car at the rear platform and another to leave the car at the front platform and to enable the conductor to get off the car at the rear platform and go a distance of 55 feet to lift the switch lever and after the car had thereupon started up and proceeded a distance of twenty-five to thirty feet, she deliberately stepped off the car backwards. In my opinion





such contributory negligence should bar her recovery.

The question of whether the car remained at the stopping place, sufficiently long to give the plaintiff a reasonable opportunity to alight, is not here involved. Even if it be assumed that it did not, the plaintiff should be held to have been guilty of contributory negligence in deliberately stepping off the car ( and that backwards) when it was in motion and after it had moved thirty feet from the stopping place. The conductor's absence from his accustomed place on the rear platform at that time, was necessarily occasioned by his duties with the switching operation, which was within the exercise by the defendants, of the highest degree of care reasonably consistent with the mode of conveyance adopted and used by them and the practical operation of the car.

I am further of the opinion that the giving of plaintiff's instruction 7 was reversible error. Even if it were applicable to the facts ( which I believe it was not) it was bad in that it failed to include the contingency that the defendant knew or in the exercise of a reasonable degree of care should have known that the plaintiff was alighting from the car or was about to do so.



10-5  
322 - 23428

GEORGE J. JACOBUECI,

Appellant.

v.

AGAR PROVISION CO.,  
a corp., et al.

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2211A 654

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendants to recover damages for a malicious prosecution. A trial was had before a judge and a jury which resulted in a verdict and judgment for defendants, to reverse which plaintiff prosecutes this appeal.

The record discloses that plaintiff was conducting a retail grocery and market in Chicago and that defendant Agar Provision Company were wholesalers of meats and food products. Defendant Keller was employed by the Agar Company. Charles Kiohr was engaged in the same line of business as plaintiff and had in his employ a young man named Jacob Ceren. In December, 1916, someone purporting to act for Kiohr called the Agar Company on the telephone and ordered a number of hams. Ceren called for the hams but did not deliver them to Kiohr or to anyone at Kiohr's direction. Instead he went to plaintiff and represented to him or one of his employees, that Kiohr was overstocked with hams and offered to sell several of them to plaintiff. Jacobucci bought a number of the hams from Ceren. There was evidence that the price paid was less than the market price and that Ceren made



of statistical methods for trend analysis. The first is a simple method of calculating the trend line by using the initial and final values and the minimum value. The second is a more complex method of calculating the trend line by using the initial and final values and the minimum value. The third is a method of calculating the trend line by using the initial and final values and the minimum value.

There are many other methods of calculating the trend line, but these three are the most common. The first method is the simplest and the most accurate. The second method is more complex and the third method is the most complex. The first method is the most accurate because it uses the initial and final values and the minimum value. The second method is more complex because it uses the initial and final values and the minimum value. The third method is the most complex because it uses the initial and final values and the minimum value.

no return to Klehr for the sale but embezzled the proceeds. Coren also procured from other wholesale dealers various other amounts of goods, supposedly for Klehr, disposed of them in like manner, and appropriated the proceeds to his own use. Coren was apprehended and taken into custody by Dennis Greedon, a city policeman, on January 4, 1917. He confessed and named Jacobucci as one of the parties who had purchased some of the goods from him. On the same day Greedon called on Jacobucci who admitted having purchased the same. On the morning of January 5 Greedon arrested Jacobucci and called up Keller to come to the station and sign a complaint. Keller signed the complaint charging plaintiff with receiving stolen property. Later in the day Jacobucci was released on bond. The case was called for trial in the Municipal Court on January 5, was twice continued until January 13 when the matter was heard and Jacobucci discharged.

The plaintiff first contends that the verdict of the jury was against the manifest weight of the evidence and should be reversed. With this contention we cannot agree. It was incumbent upon plaintiff to prove that there was no probable cause for his arrest and that the prosecution was malicious. It is true that malice may be inferred from want of probable cause, but we think the jury was warranted in finding that there was probable cause. There was evidence tending to show that Jacobucci purchased the same for about one-third of their market value and that Keller knew or understood this to be the fact. Plaintiff, himself, testified that he paid the market price for the meat but that it was "billed short". Keller got his information from Greedon who was present when Coren confessed. We think that this fact alone was sufficient to satisfy the requirement of probable cause and that, if accepted by



The first of these is the fact that the world is not a uniform whole, but is divided into many different parts, each of which has its own characteristics and its own laws. This is the case with the human world, which is divided into many different nations, each of which has its own customs, its own laws, and its own way of life. It is the duty of the statesman to understand these differences, and to treat each nation as it deserves. The second of these is the fact that the world is not a static whole, but is constantly changing. This is the case with the human world, which is constantly changing its customs, its laws, and its way of life. It is the duty of the statesman to keep pace with these changes, and to adapt his policies to the new conditions. The third of these is the fact that the world is not a simple whole, but is a complex whole. This is the case with the human world, which is a complex of many different nations, each of which has its own interests and its own desires. It is the duty of the statesman to understand these complexities, and to find a way to satisfy the interests of all.

The fourth of these is the fact that the world is not a perfect whole, but is a defective whole. This is the case with the human world, which is full of many different evils, each of which has its own causes and its own effects. It is the duty of the statesman to understand these evils, and to find a way to remove them. The fifth of these is the fact that the world is not a complete whole, but is an incomplete whole. This is the case with the human world, which is full of many different needs, each of which has its own causes and its own effects. It is the duty of the statesman to understand these needs, and to find a way to satisfy them. The sixth of these is the fact that the world is not a certain whole, but is an uncertain whole. This is the case with the human world, which is full of many different uncertainties, each of which has its own causes and its own effects. It is the duty of the statesman to understand these uncertainties, and to find a way to deal with them. The seventh of these is the fact that the world is not a certain whole, but is an uncertain whole. This is the case with the human world, which is full of many different uncertainties, each of which has its own causes and its own effects. It is the duty of the statesman to understand these uncertainties, and to find a way to deal with them.

the jury, it constituted a good defense to plaintiff's claim. The goods were not purchased by Jacobucci in the usual and customary manner common to retail dealers, and although Jacobucci testified that he occasionally purchased goods from an overstocked fellow-dealer, this fact was not necessarily known to defendants. This, we think, reasonably provided defendants with additional ground for suspicion as to the nature of the transaction. Upon a consideration of the entire record we are unable to say that the finding of the jury in favor of defendants is manifestly against the weight of the evidence. In *Jacobucci v. Cuggenheim*, Gen. No. 25627, involving practically the same facts as the case at bar, another division of this court held that a verdict for defendants was properly directed.

Plaintiff also argues that the court improperly permitted the witness, Keller, to testify that Gordon told him Gordon had confessed to him as to how he, Gordon, had obtained the hams and that he sold them to plaintiff for about one-third of their market value. The argument is that this was clearly hearsay and, under an elementary rule of evidence, inadmissible. This is a misconception of the theory on which the evidence was offered. This was properly admitted as tending to show that the defendants did not act maliciously but that they made an investigation of the facts before signing the complaint and was proper to be considered by the jury as tending to show that there was probable cause and want of malice.

Counsel next contends that the court erred in instructing the jury. The abstract of record does not contain



all of the instructions given and refused. It has been repeatedly held that error cannot be predicated on the giving, refusal or modification of instructions unless all of the instructions are set forth in the abstract. Harvey v. Harris, 230 Ill. 527; Thompson v. People, 102 Ill. 79; Siegel, Cooper & Co. v. Norton, 209 Ill. 201.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.





394 - 28656

EDWARD WALSH,

Appellee,

v.

CHICAGO RAILWAYS COMPANY and  
CHICAGO CITY RAILWAY COMPANY,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 654

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant street railway companies to recover damages for personal injuries claimed to have been sustained by him. There was a verdict and judgment in his favor for \$2540 to reverse which defendant prosecutes this appeal.

At about 12:30 o'clock on the morning of September 1, 1916, plaintiff, who was a policeman employed by the City of Chicago, was on his way to call his family physician and when he arrived at the intersection of North and Western avenues he was told that a spare tire had been stolen from an automobile which was then standing in Western avenue at the northwest corner of the two streets. He inspected the automobile and was in the act of making some memoranda when a street car came from the north in Western avenue on the west track, the front step of which struck plaintiff on the left leg. He was thrown to the ground and injured. It is to recover damages for these injuries that the instant case is brought.



Defendants contend that the trial court erred in refusing to direct a verdict in their favor for the reason that the evidence shows that plaintiff was injured by reason of his own negligence, and that the evidence also shows that defendants were in no way negligent. Plaintiff testified that at the time he was injured he was about thirty-eight years old and weighed about 240 pounds; that he left his home shortly after midnight to call his family physician to attend a member of his family; that when he reached the intersection of North and Western avenues he saw an automobile at the northwest corner of the two streets; that the automobile was standing at the west curb in Western avenue a short distance north of North avenue; that the owner of the automobile said that a spare tire had been stolen; and showed him where it had been clipped off with some sort of a sharp instrument; that the witness stood with his back to the east and as he bent over to examine the car more closely he was struck on the left leg by the street car and thrown down; "As I bent over to look at the automobile I should think I stood about two feet or so from the street car track. The step of the car hit me on the left leg around the calf and down on the side of the leg \* \* \* when the car hit me I was thrown forward on the pavement. I don't know what part of my body struck. I seemed to fall on my stomach, I guess." He further testified that he did not know that the car was approaching before it hit him and that he did not hear any bell although his hearing was good; that he did not see any light on the street car; that he was rendered unconscious for a short time, and shortly thereafter found he was sitting in the automobile; that he knew street cars ran in that street and knew that the cars stopped at that intersection on account of the cross-town tracks





in North avenue; that he stood close to the track because he had to do so in order to examine the automobile; that he thought he would see a flash, hear a bell or something in case a car was coming. He further testified, "I was facing west. This car was coming south. As to how it passed my right leg and hit my left, I had my right a little in front of my left, I suppose. As I bent over I put my left leg back. As to when I put my left leg behind, it must have been just before the car hit me."; that after he was put in the automobile some police officers came and he was taken home; that about the time he got home he felt pains in his abdomen and stomach, but they were not so severe until a couple of days afterwards; that the doctor came to see him that night and he told the doctor he had the pains; that they continued to get worse; that he was in bed three or four weeks and that about the third week a doctor for the city came and made an examination to see when he would be able to report for duty; that he still occasionally has the pains; that he went back to work about four weeks after the accident but was required to lay off a day or two at different times on account of the pains in his abdomen; that about two days after the accident the doctor called his attention to the "belly-button" which began to swell and get larger; that before the accident he had never had any such trouble; that at the time of the trial he had an umbilical hernia which was about one and one-half inches in diameter and protruded about one-half an inch; that it bothers him off and on at times when he coughs, and at other times; that he used to wear an appliance but was not wearing at the time of the trial because it got hot and was annoying; that the injury to his left leg did not trouble him very long but healed up; "It was just a little thing." On



The first of these is the fact that the British Empire is not a homogeneous entity. It is a collection of many different peoples, languages, and customs. This diversity is one of its strengths, but it also presents challenges. The second is the fact that the British Empire is not a static entity. It has changed over time, and it is likely to continue to change in the future. The third is the fact that the British Empire is not a monolithic entity. It is a collection of many different peoples, languages, and customs. This diversity is one of its strengths, but it also presents challenges. The fourth is the fact that the British Empire is not a static entity. It has changed over time, and it is likely to continue to change in the future. The fifth is the fact that the British Empire is not a monolithic entity. It is a collection of many different peoples, languages, and customs. This diversity is one of its strengths, but it also presents challenges. The sixth is the fact that the British Empire is not a static entity. It has changed over time, and it is likely to continue to change in the future. The seventh is the fact that the British Empire is not a monolithic entity. It is a collection of many different peoples, languages, and customs. This diversity is one of its strengths, but it also presents challenges. The eighth is the fact that the British Empire is not a static entity. It has changed over time, and it is likely to continue to change in the future. The ninth is the fact that the British Empire is not a monolithic entity. It is a collection of many different peoples, languages, and customs. This diversity is one of its strengths, but it also presents challenges. The tenth is the fact that the British Empire is not a static entity. It has changed over time, and it is likely to continue to change in the future.

cross-examination he testified that the doctor called his attention to the hernia about two days after the accident; that he began to wear a belt when he first went back to work, which was about a month after the accident; that he wore it off and on; that afterwards he stopped wearing it but wore a tight belt around his trousers; that he was five feet and ten inches tall and weighed 240 pounds; that he was then traveling a beat as a city policeman and had worked most of the time since the accident although he had been compelled to lay off a few days at a time on account of the hernia.

Doctor Weil testified for the plaintiff that he saw the accident; that he lived in the neighborhood but did not know plaintiff personally before the accident; that he had just got off a North avenue car and was waiting for a southbound Western avenue car; that when he got there there was an automobile standing at the west curb in Western avenue about fifty feet north of North avenue; that plaintiff was standing with his face to the west examining the automobile; that the front step of the street car struck plaintiff; that there was no headlight on the street car and that he did not hear any bell; that when the street car struck him plaintiff fell; that two witnesses ran over to him and plaintiff seemed to be unconscious and did not answer but just lay there a minute or two; that someone called the police station and two officers came, put plaintiff in the automobile and took him home; that about one-half an hour thereafter witnesses went over to plaintiff's house and made an examination of him; that he found bruises and contusions on the back part of the calf of the leg; that at the time plaintiff "complained of terrific abdominal pains at the umbilical region"; that he advised plaintiff to put on ice bags and to stay in bed; that he dressed the wound on the leg; that there



were no objective signs in the umbilical region; that he called on plaintiff again the next morning; that plaintiff again complained of terrific abdominal pains but that there were no objective signs; that plaintiff stated he could not sleep all night on account of the pains; that the witness then re-dressed the wound in the leg and continued treating for about four weeks; that he visited him daily for about ten days or two weeks and that during that time plaintiff complained of abdominal pains; that about the third week the witness noticed the enlargement of the umbilical region, "a protrusion of the tissues out of the umbilicus"; that he then told plaintiff that he had an umbilical hernia and advised the wearing of a belt; that the medications he had prescribed did not seem to stop the pain; that the hernia developed and was then about the size of a small nut and seemed to get larger; that about the second month plaintiff got an umbilical belt and that after that time the witness had seen plaintiff about once a month for about a year, and that plaintiff had a "fully developed umbilical hernia"; that such a hernia might be cured by an operation, but that such operations were not always successful; that the injury to the leg made a complete recovery in about a week; that in his opinion the hernia was due to "traumatic condition, injury to the abdomen"; that the witness was a graduate of Northwestern University Medical School and had been practicing as a physician and surgeon for about twelve years; that he was also connected with Northwestern and Loyola Medical Schools as a teacher since he had been practicing. On cross-examination he testified that he had never operated on umbilical hernia; that he had known of some operations that were successful and seen that





were not. It further developed that the witness might have some feeling against defendants because his mother had been injured by them; "Q. After that, (referring to mother's case) do you remember Mr. Anderson going to you and you saying that whenever the street car company was involved, you would stick it in just as hard as you could, did you ever say that? A. Yes, after he promised to pay me-- I didn't say that to Mr. Anderson. I never said that. I did not send this case to Mr. Spencer and Mr. House. I have had a number of cases with them. I did not send this case directly."

Dr. Wallin testified that he was graduated in 1907 from the University of Illinois and was a practicing physician connected with the city; that on September 21, 1916, he went to plaintiff's home and examined him to ascertain when plaintiff might be able to return to work; that at that time he found plaintiff suffering from a contusion on the left leg, and that he also found evidence of an umbilical hernia; that there was a slight pouch or protrusion of the gut there about the size of a button.

Dr. Smith testified that he was a graduate of the medical department of the University of Illinois and was practicing his profession; that he was the physician for the life insurance companies and examined persons applying for insurance; that he examined plaintiff May 19, 1914, and found no evidence of any hernia.

George Lamsus was an occurrence witness, and as to how the accident happened he testified that he saw plaintiff with one foot on the ground and the other on the running board of the automobile bending over making some notations on some



paper which he held in his hand; that the street car came from the north and struck plaintiff; that he fell back against the car and that it struck him again and knocked him down and that the witness and some other person picked plaintiff up and put him on the sidewalk; that the other person claimed to be a doctor and advised that plaintiff be taken home; that plaintiff was then placed in the automobile and was taken away; that the witness did not hear any bell sounded. On cross-examination he stated that he and a friend of his were sitting on a newsstand at the northwest corner of the two streets and that some man asked them if they had seen anyone take a tire off the automobile; that there was a lady in the automobile, and that there was quite a crowd around it, about twelve or fifteen people; that the step and the body of the car struck plaintiff and that the witness was standing about three feet from the officer at the time.

F. E. Becker, Jr. witnessed the accident and testified that his attention was first attracted by a crowd standing around the automobile and someone spoke about a tire; that he saw plaintiff there; that plaintiff was in uniform and had a note-book in his hand getting information; that the street car came from the north, struck plaintiff and threw him against the machine; that a couple of men picked plaintiff up and put him in the machine; that he believed there was a light on the front of the street car although he was not positive, but that he did not believe that a bell was rung; that the automobile was a seven passenger car. On cross-examination he testified that he saw plaintiff, who was standing with one foot on the ground and the other on the running board of the machine, with a note-book and pencil in his hand taking down information; that the automobile was about thirty-five





or forty feet north of the North avenue crosswalk. Two police officers testified that they arrived on the scene shortly after plaintiff was injured and took him home in the automobile. One of the policemen testified that when he arrived at the place of the accident there were ten or twelve people gathered there.

For the defendants, John Hinson, who at the time of the accident, was the motorman of the street car in question, but at the time of the trial was employed by the Crane Company, testified that the headlight of the street car was burning when they left the car barn, which was about six miles from the place of the accident; that cars coming south in Western avenue always stop at North avenue because there is an intersecting street car line there; that when the street car was about 100 feet north of North avenue he noticed an automobile at the west curb near the north crosswalk of North avenue; that there were a couple of people standing there; that he rung the bell a couple of times as the car passed under the elevated, which was about 100 feet north of the place in question; that the street car was running slow and at the time the front step struck plaintiff the car was going about four miles per hour; that as soon as plaintiff was struck the car was stopped, within four or five feet; that the car was of the pay-as-you-enter type, but the stop was stationary; that he saw plaintiff standing near the rear of the automobile, which was facing south, and which the witness thought, was four or five feet from the west rail of the track; that he thought he had a lot of clearance and that just as he was about to pass "this officer he stepped right back, maybe two steps, and the front step just hit his leg. I got off the car and asked him if he was hurt, and he said 'No'. Then he



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 out its policy of non-interference.

walked around the automobile and got in it and drove away. He did not limp very much. He limped a little. The conductor got his number." On cross-examination he testified "I always ring my bell about coming up to a crossing anyways"; that he rang it four or five times while approaching the North avenue crossing at that time; that he did not ring it all the time for there was no necessity; that he saw the automobile standing there and a number of people around it; "I kept on ringing it so that these people would know that I was approaching. I was just about two paces from the officer when he stepped back in front of the car. He stepped east about three steps \* \* \* I was not ringing the bell right when I hit him. I rang it loud a little ways from where he stepped back. \* \* \* His back was towards me. \* \* \* The car was running about four miles an hour when it hit this man \* \* \* When I saw the officer he was standing at the rear end of the automobile. It was heading south." The conductor testified that he had about thirty or thirty-five passengers on the car; that he did not see the accident; that he was at his accustomed place on the back platform and as the car approached the crossing he looked out to see how many passengers were to board the car at North avenue; that he saw plaintiff standing back of the automobile; "It looked to me that he was way clear of the car then. And I turned my back to the platform, just as usual, to receive the people's fare getting on"; that he gave the motorman the bell to go ahead, but that when he did not do so he looked around and saw that there had been an accident; that he took plaintiff's number, and that there were a couple more men there; These were the only two witnesses who testified on behalf of defendants as to how the accident happened. Mrs. Leeming, Schuseler and Tenney qualified as



experts and testified hypothetically that in their opinion the hernia could not have been caused by the accident. Dr. Lemming gave as his reason that if the hernia was suddenly brought on by violence, it would be a "stretcher case"; that plaintiff would not be able to walk after he had "a hole punched through his belly wall"; that the absence of any objective signs would preclude the possibility of a tear in the belly wall because there would be a good deal of blood under the skin as well as swelling and redness, if the hernia had been brought on suddenly. Dr. Schmesler in giving the reason for his opinion testified that a "traumatic hernia" would not develop three or four days after the injury; it would develop immediately; that common causes of umbilical hernia in a man of such weight and height are weakness of the abdominal wall, increased pressure within the abdominal cavity, and strain; that any of these will sometimes cause a hernia. Dr. Tenney testified that when a hernia is caused by trauma, "the tissues that permit the hernia to appear are torn." These doctors further testified hypothetically that such a hernia could be readily cured by an operation, although they further testified that all of such operations were not successful. Dr. Lemming testified that it was a serious operation.

This is substantially all of the material evidence in the case and from a careful consideration of it, we are of the opinion that the court properly refused to direct a verdict for the defendants. For it appears, and there is little contradiction on this phase of the case, that plaintiff was standing with his back to the street car and the evidence shows that there was about two or three feet between the





street car and the automobile, a rather narrow place for a man of plaintiff's proportions to stand so as to permit the street car to pass. The evidence also tends to show that plaintiff did not know of the approach of the street car, and in these circumstances we would not be warranted in saying that plaintiff was guilty of negligence as a matter of law. For although there was little dispute in the facts, yet different conclusions might reasonably be drawn from such facts and in such circumstances it was proper matter for the jury.

Defendant next contends that the damages are excessive, and this argument is predicated on the contention that the hernia did not result from the accident. Of course, if this is the fact, the judgment would be excessive for it is not claimed that the injury to plaintiff's left leg was at all serious, but on the contrary, it is admitted that it healed up within a very few weeks. The chief argument on this point is that the hernia was brought about by a blow on the abdomen, and that since the evidence shows there were no objective signs at the time of the accident or shortly thereafter, it follows that the hernia was not caused by trauma. It appears that plaintiff's position is that this hernia was due to trauma, yet we think the jury were fully warranted in finding as they must have found, that the hernia was caused as Dr. Schuessler testified a hernia might be caused, by strain. Upon a consideration of the entire record, we think the jury might find that when plaintiff was thrown down when struck by the street car, and when he afterwards complained of a severe pain in the abdominal region, that this was caused by an undue strain of the tissues. Upon the whole record, we cannot say that the finding of the jury that the hernia was



the result of the accident is against the manifest weight of the evidence.

Complaint is also made to the giving of instructions Nos. 7, 8, 9, 10, 13, and 15. The chief objection is urged against instruction 15. That instruction told the jury that if they found the defendant guilty, then in determining the amount of damages the jury had a right to and should take into consideration all the facts and circumstances attending the injury as shown by the evidence and that they should allow fair compensation for the injuries sustained by plaintiff as shown by the evidence, so far as such damages and injury were claimed in the declaration and proven by the evidence. The objection to this instruction is that it told the jury they might award damages in case they found for the plaintiff, for all of the injuries plaintiff received, whether they found that the hernia was caused by the accident or not. We think this objection is not well taken. It is further claimed that this instruction was wrong because it did not submit to the jury the question whether the hernia could have been readily cured and the damages thus reduced. There was no evidence that anyone advised plaintiff to submit to such an operation. He had a doctor taking care of him and there was no suggestion that an operation had been advised, nor is there any evidence that an operation would cure plaintiff. This would be a major operation, a serious one, and we do not believe we would be warranted in holding that plaintiff must submit to it or lose any damages he had sustained by reason of the hernia under the facts as disclosed by the evidence in this case. The objection to instruction 9

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is that it told the jury that in determining a question of fact they should be governed solely by the evidence, while the law is that they must do so under the law as laid down in the instructions by the court. Instruction No. 10 told the jury that they were the sole and exclusive judges of the credibility of the witnesses and of the weight to be given their testimony. This instruction was approved in S. & A. Ry. Co. v. Fisher, 141 Ill. 614, and we have this day held the same instruction unobjectionable in Lundquist v. Chicago Railways Co., et al. Gen. No. 13020. Instruction 14 told the jury that if, under the evidence, they found the defendant guilty, "then you should proceed at once to assess plaintiff's damages in accordance with these instructions." Instruction No. 8 was inaccurate and instruction No. 14 should not be given in any case as it certainly would not assist the jury in arriving at a proper verdict. The jury were told in other instructions that they must find their verdict from the evidence and under the instructions of the court, and we think no special injury has been done to the defendants in giving these instructions in this case. Instruction 7 told the jury that if they found for the plaintiff and that if he had sustained damages by reason of physical pain and suffering which resulted from the negligence of the defendant as charged, then to enable the jury to estimate the amount of such damages so caused by mental injury and physical pain and suffering, it was not necessary that anyone testify to the amount of such damages. The words "mental injury", of course, have no place in the instruction, but since we have held that the verdict was not excessive we think this error was not of such a serious character as would warrant a reversal. Instruction 9 told the jury that plaintiff was only required to exercise reasonable care for his own safety, but that he was not required to exercise extraordinary care for his own safety. We think there can be no serious objection to this instruction. By instruction 13 the jury were told that





ver after it was read, and it was apparently considered proper. The point is, therefore, not properly before us.

It is also urged that it was error to permit Dr. Smith, who examined plaintiff for insurance May 19, 1914, to testify that he found no evidence of hernia at that examination, for the reason that it appeared the doctor had no present recollection of his examination but that his testimony was based entirely on the fact that he had recently examined a written report made by him at the time of the examination. This developed on re-cross-examination. Thereupon defendants moved to strike out the doctor's testimony which motion was overruled. Defendants then cross-examined the doctor as to the nature of the examination he made of plaintiff at that time. He testified, "I palpated the abdomen to see if there was any evidence of an umbilical hernia. Then I introduced my finger up into the scrotum through the rings. I had him cough, and there was no evidence of hernia." From this it appears that the witness testified as though he had a present recollection of the particular things he did in making the examination. No objection that the written report made by the doctor at or near the time of the examination was not in court. In these circumstances we cannot say that substantial error was committed. We have recently given very careful consideration to a somewhat similar proposition in the case of Each v. Pearson, Gen. No. 25345, and we there held that where a party makes written memoranda of facts when they are sufficiently fresh in his mind and afterwards on the trial testifies to this effect and that the report then made by him was accurate, but that upon an examination of it he has no present recollection of the matters therein



contained, then the document itself may be read or introduced in evidence unless there is something in the document that would be inadmissible.

It is also claimed that it was error to permit plaintiff to exhibit the hernia to the jury as it could have been readily described; that the only purpose of exhibiting it to the jury was to arouse their passion and sympathy, and it is argued that the result of this exhibition was that the jury allowed damages for such hernia. In view of what we have said in regard to the amount of the verdict we think the point is of nominal importance only.

It is also contended that there was prejudicial error in the argument of counsel for plaintiff to the jury; that in his closing argument one of plaintiff's counsel said that defendants' counsel did not like Dr. Weil because he attempts to cure people the street car companies injured, while Drs. Leeming and Tenney devoted their time to a great extent not in curing sick people but in swearing away their rights. Of course, this argument, was highly improper and without warrant in fact, as there was nothing in the testimony of either of the doctors that would warrant any such statement. On the contrary, they both appear to have given to the jury their best judgment as to whether the hypothetical case of hernia submitted to them might have been caused by trauma. While we have recently reversed a judgment principally in the ground that the argument of counsel was improper. Faulsen v. McAvoy Mfg. Co., Dec. No. 25225, we are of the opinion that in the instant case the argument, although improper, does not constitute reversible error.

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The judgment of the Circuit Court of Cook County  
is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.



403 - 23664

OTTO SCHULZ,

Appellant,

v.

WILLIAM R. HEALEIGH,

ROSA GLEICH, as administratrix  
of the estate of Tobias C.  
Gleich, Deceased,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 654

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

On March 16, 1918, Otto Schulz recovered a judgment  
by confession against William R. Healeigh. An execution was  
issued on March 18 and returned by the bailiff of the Municipal  
Court on March 20 no part satisfied. Two days thereafter,  
in the same case, an affidavit for garnishment summons was  
filed and Tobias C. Gleich was served. After issue joined  
the case was heard and the garnishee discharged, to reverse  
which plaintiff prosecutes this appeal.

Defendant contends that the judgment should be af-  
firmed because the record fails to show that an execution was  
issued, a demand made, and the return of the execution prior  
to the garnishment proceedings. In this we think the defendant  
is in error. While the execution does not appear either in  
the common law record or in the bill of exceptions, the record  
affirmatively shows that the execution and the return were



Figure 1 shows the relationship between the variables Y and X. The line represents the function  $Y = X$ . The area under the line is shaded, representing the integral of the function from 0 to 100. The horizontal and vertical lines at 50 illustrate the value of the function at that point.

The graph illustrates the concept of integration. The area under the curve represents the total value of the function over the given range. The horizontal and vertical lines at 50 show the specific value of the function at that point, which is 50.

offered in evidence and the date of the issuance and the return given. We must presume, of course, that the bailiff performed his duty and demanded payment of the judgment. While the bill of exceptions certifies that it contains all of the evidence, a recital in it shows that such is not the case. We must, therefore, presume that an execution was issued, a demand and proper return made. Garrity v. Hamburger Co., 136 Ill. 499.

So far as it is material to state the facts, they are: that Nealeigh was a real estate broker and that Tobias O. Gleich owned some Chicago real estate and advised the broker that he would sell or exchange the same for other property; that afterwards the broker got in touch with another party, one Sparrow, who owned some real estate in Canada, and brought Sparrow and Gleich together. They entered into a written agreement whereby they were to exchange their property and deeds were prepared to effect the conveyances. Gleich executed his three notes aggregating \$7500 which were to be turned over to Nealeigh as his commission when the deal was consummated. The notes were not delivered. The deeds and other documents were placed in escrow with the Chicago Title & Trust Co. There was a third mortgage on the Chicago property for \$10,000 which would be due shortly and it was provided in the escrow agreement that unless Sparrow could make some arrangement whereby this mortgage could be extended within a stipulated time the deal would be called off as Sparrow could not handle the Chicago property unless this mortgage was taken care of. The escrow agreement further provided that at the expiration of the time mentioned, if Sparrow had not effected arrangements with reference to the \$10,000 mortgage, all of the papers would be returned to the





respective parties. Sparrow was unable to do anything about the mortgage and by agreement of all the parties, after the lapse of the specified time, the papers were returned and the deal was off. A few days afterwards another broker, Schenck, who had participated in the previous negotiations, again got the parties together and informed them that he could make arrangements to take care of the \$10,000 mortgage. This he did by purchasing the mortgage and extending the time of payment. This being done, the deal was consummated on the original terms.

This is substantially the case as stated by plaintiff's counsel, and he argues that although he failed to consummate the deal, yet since he was the broker who originally introduced the parties and because the deal was afterwards carried out he was entitled to his commission. Of course, this contention is unsound, because the evidence clearly shows that plaintiff was not to be paid any brokerage fees unless the deal which he negotiated was consummated. Plaintiff admits that this deal failed of completion because of the inability of Sparrow to secure a release or extension of the mortgage. In these circumstances he was not entitled to any commission.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

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438 - 25699

FRANK BROCKWAY,

Appellee.

APPEAL FROM

v.

CIRCUIT COURT,

COOK COUNTY.

T. WILLARD HENRY,

Appellant.

221 I.A. 654

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit in attachment against defendant based on a judgment of \$517.89 which he obtained in the District Court of Johnson County, Ia. The declaration consisted of the common counts for services rendered and money expended by plaintiff on behalf of defendant in caring for two horses. There was a finding and judgment in favor of plaintiff for \$468.50 to reverse which defendant prosecutes this appeal. On the trial of the case before the court without a jury there was no evidence introduced concerning the judgment in Iowa.

From the evidence it appears that on March 30, 1917, the parties entered into a written agreement whereby plaintiff was to take charge of and train for racing purposes two horses belonging to defendant from that date until July 4 following. The horses were sent by defendant to plaintiff at Marysville, Mo. It is conceded that the written contract of March 30 was fully performed. On July 4 defendant went to Missouri and saw plaintiff. One of the horses had been killed in the meantime.

Plaintiff's position is that at that time, July 4, 1917, the parties entered into an oral agreement whereby defend-





ent was to pay plaintiff \$100 per month and expenses for training and racing the remaining horse. This plaintiff agreed to do and afterwards took charge of the horse and trained and raced him for a period of three months, for which he claims \$100 per month; that plaintiff continued to keep the horse until the following Spring. For this there were certain charges making the total of plaintiff's claim \$400.00. There is an intimation that this horse was attached in Iowa and sold to satisfy the judgment there obtained.

Defendant's position is that when he saw plaintiff in Missouri on July 4 he did not agree to pay plaintiff \$100 per month for taking care of the horse, but on the contrary, as we understand his testimony, he told plaintiff that he was through with the matter. He testified, "It is up to you if you want to sell him, then it is up to you to sell. I am through, either ship him back, get the money from me. I told him I was through as far as I was concerned, that I was through paying according to my contract." He also testified that he never made any further agreement. Defendant also introduced in evidence a letter written by plaintiff to him dated November 26, 1917, wherein the plaintiff said, among other things, that he wanted to see defendant and agree on the amount that was to be paid plaintiff for taking care of the horse after July 4. The letter stated, "We had better agree on the balance for I want it to be satisfactory with you, and we had no agreement on the time after July 4th, but I assure you that I will be fair and right." Little, if any, significance was given this letter on the trial. We think it strongly tends to show that defendant did not agree to pay plaintiff \$100 per month after July 4. No attempt was made to explain the letter and in these circumstances, we think the



Finding of the court is favor of plaintiff for the amount of his claim, \$443.80, is against the manifest weight of the evidence. We are of the opinion, however, that the facts were not fully presented to the trial court. We will not, therefore, reverse the judgment with a finding of fact but will remand the cause for a new trial.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMPSON, J. CONCUR.



488 - 25713

CITY OF CHICAGO, Appellee,

v.

CHARL BENNETT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 655

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Charles Bennett, a police officer of the City of Chicago, appeared in the Municipal Court on July 31, 1919, on behalf of plaintiff, and presented a sworn complaint made by him charging defendant with the violation of sec. 2012 of the Municipal Code of Chicago of 1911. The officer, in the name of the city asked leave to file the complaint. Upon examination of the complaint and examination under oath of the officer, the court was satisfied that there was probable cause for filing the complaint and leave was given to file the same, which was accordingly done. Defendant executed a written waiver of a jury trial and the cause was heard by the court who found defendant guilty and assessed a fine of \$200 against him. It was ordered that in default of payment he be committed to the House of Correction for a period not to exceed six months.

This case is in all respects similar to the case of City of Chicago v. Bennett, Cas. No. 25713, which opinion has this day been filed, and what we there said is controlling here.

The judgment of the Municipal Court of Chicago is affirmed.

ADVISED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.





453 - 25714

CITY OF CHICAGO,

Appellee,

v.

JAMES BENSON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 655

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On July 31, 1919, Charles Bennett, a police officer of the City of Chicago, appeared in the Municipal Court, on behalf of the City of Chicago, and presented a complaint sworn to by him charging the defendant, James Benson, with the violation of sec. 8012 of the Municipal Code of Chicago, 1911. The officer, in the name of the City, asked leave to file the complaint and the court upon examination of it and upon examination under oath of the officer, was satisfied that there was probable cause for filing the complaint and leave was given to file the same, which was done. Defendant in writing waived a jury trial and the cause was heard. Defendant was found guilty and a fine of \$200 was assessed against him. It was ordered that in default of payment he be committed to the House of Correction for a period not to exceed six months.

The case is in all respects similar to CITY OF CHICAGO v. BICKSON, Gen. No. 25713, which opinion has this day been filed, and what we there said is controlling here.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. and THOMSON, J. CONCUR.



446 - 25727

EUGENE FINAN, a minor, by  
his next friend, Michael J.  
Finan.

Appellee.

v.

CHICAGO RAILWAY COMPANY, et al.

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 655

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

By this appeal defendants seek to reverse a judgment of \$10,000 recovered against them by plaintiff in an action for personal injuries.

The record discloses that plaintiff, a little boy between six and seven years of age, was playing on the east sidewalk of Ashland avenue, a north and south street in Chicago. The defendants maintain and operate a double line of street cars in that street. About 6:00 o'clock in the afternoon plaintiff was spinning a new top, - which rolled out into the street and in front of a northbound car. Plaintiff ran after the top, was struck by the car and received injuries which necessitated the amputation of his right arm about four inches from the shoulder.

Plaintiff contends that he has established defendants' liability under two counts of the declaration, one charging defendants with negligently backing the car after plaintiff was struck and the other that defendants failed to equip the

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car in question with a proper fender as required by an ordinance. It is conceded that there was no negligence in the operation of the car until after the boy was struck.

The evidence shows that defendants' car was coming north on the east track between 35th and 36th streets at about 8:00 o'clock in the evening at a normal rate of speed. It was broad daylight and plaintiff and an older boy were on the east sidewalk about midway between 35th and 36th streets. Plaintiff had just purchased a new top and was endeavoring to spin it when it rolled into the street in front of the approaching car. He ran after the top and either fell on the street car track in front of the car or was struck by the northeast corner of it. As soon as the motorman saw the little boy running toward the car, he brought it to a stop as quickly as possible.

There is a dispute in the evidence as to the position of plaintiff after the car was stopped. Most of the witnesses for the plaintiff testified that he was lying on his back with his head to the south under the car with his right arm extended east of the east rail and that the arm was caught or pinched between the front wheel of the car and the rail. They also testified that he was wedged or caught in or about the front truck of the car. On the other hand, witnesses for the defendants testified that he was lying on his back with his head to the north, east of the east rail, with his right arm extended under the car, and that the arm was pinched or caught by the front wheel. The evidence further shows that as soon as the car was stopped the motorman and conductor and some of the passengers got off the car and went to the forward end where plaintiff was and looked to see



just how he was caught; that other persons gathered around and there was considerable excitement; that plaintiff was screaming and making considerable of an outcry; that the conductor then told the motorman to back the car and that the motorman then got on the platform and backed the car which released plaintiff; that plaintiff was subsequently taken to a nearby drug store and shortly thereafter removed to a hospital where the surgeons, after an examination of the boy's arm and a consultation with his father, amputated the arm about four inches from the shoulder. There is a dispute in the evidence as to how far the car was backed. Witnesses for the plaintiff testified that the distance was from 15 to 20 feet while those for defendants placed the distance at from 2 to 3 feet. Testimony of some of the witnesses further tended to show that when the car was backing up the plaintiff was dragged along with it and that his head was bouncing up and down on the granite block pavement of the street; that one of the witnesses shouted to the motorman to stop the car as he was tearing the boy to pieces. Other witnesses testified to the effect that the boy was not dragged when the car backed up.

The evidence further showed that the car was equipped with a fender known as the H. & B. type. The fender is located about 48 inches back of a trip gate suspended across the track and underneath the front part of the car. Normally the fender is carried about 7 inches above the rail and when an object comes in contact with the trip gate it swings backward and trips the fender causing the latter to drop to the rail. The dropping of the fender is accelerated by a coil spring fastened to the bottom of the platform. When the car stopped the





fender had not been tripped but was in its normal position. The fender had been examined prior to the accident and was in good working order.

The ordinance of the city which required the fender on the car and on which liability is predicated provided that "All cars shall be equipped with serviceable and efficient fender devices." Plaintiff's position is that he fell in front of the car, that the fender failed to work and, therefore, there was a violation of the ordinance.

Defendant's position is that plaintiff did not fall on the track in front of the car but that he came in contact with the northeast corner of it back of the trip gate and, therefore, was in no position to come in contact with the gate and that it was for this reason that the fender did not operate.

The ordinance which requires serviceable fenders on street cars creates a body known as the Board of Supervising Engineers, on which Board the City is represented, and the evidence shows that, after competitive tests had been made, the particular fender was adopted and approved by this Board as the best obtainable. Defendants were required by the proper city officials to equip their cars with this type of fender. And if it be conceded that plaintiff's evidence made out a prima facie case of negligence against defendants for failure to equip their cars with serviceable fenders, this was overcome by the evidence we have just stated. There is no dispute but that the fender was in good workable order. In these circumstances we think it clear that defendants were guilty of no negligence in this respect. It certainly would be most unreasonable to hold that the street car companies had violated



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the ordinance requiring serviceable fenders on their cars in the event that a fender failed to work in every case, where the evidence showed that no such fender could be had. The law does not require the impossible, and any law or ordinance that contained a provision requiring the performance of something that was impossible of performance, obviously would be null and void. But plaintiff argues that because the fender in question could not be tripped from the platform of the car it was not such a serviceable fender as the ordinance required. There is no dispute that the fender in question could not be so tripped, and plaintiff's contention is that since it was shown from the annual report of the Board of Supervising Engineers, offered in evidence, that the M. & B. fender, which was in extensive use, may be tripped and reset from the platform, that this shows the fender was not serviceable as required; that if it was so equipped, the injury to plaintiff might have been avoided. A witness for defendants, who seemed to be well qualified, testified that he was familiar with fenders, and that the M. & B. fender could not be operated by anyone standing on the front platform. Whatever the fact may be on this point, it is undisputed that the M. & B. fender approved by the Board of Supervising Engineers and the city and required to be in use in Chicago could not be tripped from the platform and that the fender on the car in question was of the approved type. In these circumstances we think that no liability can be predicated on the count of the declaration charging a violation of the fender ordinance. Moreover, we do not believe that in the state of the record, we would be justified in saying that a fender which could be tripped from the platform would be more serviceable than one which could not be so tripped.



But plaintiff's main contention is that the verdict is justified because the defendants were guilty of negligence, (1) in backing the car without first making a reasonable effort to extricate the boy; (2) in backing the car an unnecessary distance, and (3) in failing to discontinue the backing after it was apparent to the motorman that it was ineffective and was injuring the boy more. We think the evidence establishes that as soon as the car was stopped the motorman and conductor got off, went to the boy and looked to see what the situation was; that a number of other persons did likewise; that the plaintiff's right arm was pinned between the front wheel and the rail and that he was caught and wedged in and about the front truck; that he was making an outcry and that everyone was more or less excited; that the conductor after this inspection told the motorman to back the car; that no one suggested that this should not be done; that thereupon the motorman got on the car and backed it up. Naturally everyone was anxious to rescue the little boy from his perilous position. Quick action was required. Neither the street car men nor the bystanders could be expected to reason out the matter calmly and coldly. In these circumstances we think it clear that there was no negligence as a matter of law nor as a matter of fact in backing the car, for the undisputed evidence is that by the backing the boy was loosened or released so that he could be removed.

The remaining question is whether the car was backed an unnecessary distance. The testimony of some witnesses tended to show that after the car had started to back it was apparent that the boy was being severely injured and that they called to the motorman to stop the car which he did. On the other





hand, the motorman denied that there was any such demonstration and that backing the car any distance would not injure the boy further because the backing simply released him. We think the liability of the defendants under this count, as shown by the evidence, is extremely doubtful, but upon a careful consideration of it we are constrained not to reverse the judgment with a finding of fact, but to reverse the judgment and to remand the cause for a new trial under this charge of negligence only, viz: whether there was negligence in backing the car too far.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Taylor, P.J. concurs.

Thomson, J. dissenting:

I am unable to concur in the foregoing opinion. As I understood it, there is no contention that up to the point where the car came to a stop the first time with the plaintiff's arm pinned down between the wheel and the rail there could be a recovery. Such seems clearly to be the case.

The question of whether what happened after that, namely the backing of the car the distance it was backed, was negligence contributing in whole or in part to the loss of the boy's arm, was one of the questions submitted to the jury. If the jury's verdict is based on their conclusion that it was negligence to back the car as it was backed, and that such negligence did contribute to the loss of the plaintiff's arm, then in my opinion it is not supported by the evidence.

I have searched diligently but can



find in the record no evidence whatever either showing or tending to show that the injury to this boy's arm had not been fully sustained before the car was backed at all. Without such a showing I am of the opinion that a judgment for the plaintiff should not stand, based on that alleged negligence, and that, therefore, the judgment should be reversed. I appreciate the difficulties surrounding the making of such a showing by the evidence, and the seriousness of the injury suffered by this young plaintiff, but these are considerations that should not interfere with the operation of the rule referred to.

The first part of the paper is devoted to a general  
discussion of the problem. It is shown that the  
problem is equivalent to the problem of finding  
the minimum of a certain functional. This  
functional is defined in terms of the solution  
of a certain boundary value problem. The  
problem is then reduced to the problem of  
finding the minimum of a certain functional  
defined in terms of the solution of a certain  
boundary value problem. The problem is then  
reduced to the problem of finding the minimum  
of a certain functional defined in terms of the  
solution of a certain boundary value problem.

473 - 25736

DURAND & KASPER CO., a corp.,

Appellee,

v.

ANTON WOOLBROCK and  
ERONISLAVA WOOLBROCK,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 655

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Complainant a corporation filed its bill against defendants to establish their liability on a fidelity bond and to foreclose a trust deed given by them to secure the liability on the bond. There was a finding that complainant's damages exceeded the penalty of the bond, viz: \$2,000, and it was decreed that unless defendants paid complainant \$2,000 within 30 days the property conveyed by the trust deed be sold, to reverse which defendants prosecute this appeal.

The record discloses that complainant is an Illinois corporation conducting a wholesale grocery business in Chicago; that it had in its employ as a salesman one Thomas A. Kissell, who was related to defendants; that from about the year 1900 Kissell had been in complainant's employ selling its products; that about September, 1913, it was found that he had collected for goods he had sold more than \$4,700, which amount he failed to turn over to complainant; that thereupon complainant caused a complaint to be filed against him in the Municipal Court of Chicago and warrant was issued for



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his arrest; that on September 26, 1913, the defendant, Anton Woolbeck, entered into a written contract with complainant whereby it was agreed, inter alia, that in consideration of complainant re-employing Kissell he, Woolbeck, would pay to complainant \$2,000 to apply on Kissell's indebtedness. On the next day complainant entered into a contract of re-employment with Kissell which stated that in consideration of the employment Kissell agreed, when so requested by complainant, "to assist in collecting all doubtful and delinquent accounts which may arise in his territory without compensation and without any expense" to complainant. At the same time Kissell, as principal, and defendants, as sureties, executed the fidelity bond in question, wherein it is stated that complainant had employed Kissell as "salesman and collector". The condition of the bond, which was in the sum of \$2,000, was that if Kissell should honestly and in good faith discharge his duties "as such salesman and collector and shall also account for all moneys, properties and other things which may come into his possession or under his control, then the obligation to become void, otherwise to remain in full force and effect." October 9 following the defendants executed and delivered the trust deed in question conveying certain property in trust to secure any obligation that might be incurred on the bond. This trust deed recited the execution of the bond and the employment by complainant of Kissell "as a salesman and collector in its business as wholesale grocers", and that if Kissell should perform his duties honestly and in good faith "as such salesman and collector and shall also account for all moneys" which may come into his possession, then the obligation to be void. The proceedings brought in the Municipal Court against Kissell were dismissed. He began his duties as salesman and



collector for complainant under the contract of September 27, 1913, and continued to perform such duties until about March 1, 1915. About February 22, 1915, he collected for merchandise he had sold \$142.79, which he converted to his own use. Between that date and March 1 he collected and failed to turn in other accounts and it was to recover the amount of defalcations, not, however, exceeding the amount of the bond, \$2,000 that the present suit was brought.

Defendants contend that the decree was erroneous because, under the contract between Kissell and complainant, he was authorized to collect only doubtful and delinquent accounts; that there was no proof that the collections made by Kissell were of accounts which were doubtful or delinquent, but that on the contrary it appears from the evidence that such accounts were current. In support of this it is argued that it is a principle of law that where two or more instruments are executed at or about the same time bearing on the same subject-matter they should be construed together; that the undertaking of the defendants, they being sureties, should be strictly construed, and that upon a construction of the contract of employment, bond and trust deed it will appear that Kissell was authorized to collect only doubtful and delinquent accounts. Even if the rule of construction contended for be conceded, yet we think it is not applicable here for the reason that the bond and mortgage, which were executed by the defendants, expressly stated that Kissell was employed as a "salesman and collector" and there was no limitation as to the character of accounts he was to collect. And the evidence shows that defendants knew nothing of the provisions of the contract of employment. In these circumstances we think it clear that defendants expressly





agreed to make good any loss accruing to complainant by reason of any default on the part of Kiesel in failing to account for money collected by him.

It is further argued that the mortgage cannot be enforced because it was without consideration; that although it recited a consideration of \$10.00 paid to and received by defendants, the evidence shows that they received nothing; that although the mortgage is under seal and recites a consideration, yet in equity the real consideration may be shown and if there was none, the mortgage is void and unenforceable; that since the mortgage was executed about 12 days after the bond it required a new consideration and that the original consideration of the bond would not validate the trust deed. In support of this it is said that a sealed instrument will not be enforced in equity where there is no consideration and the cases of Grandall v. Willig, 166 Ill. 232, and Garbutt v. Grunkhite, 239 Ill. 18, are cited. In both of these cases it was sought to compel specific performance of contracts under seal, and it was held that the true consideration could be shown and if there was none, specific performance would not be decreed. We think neither of these cases are in point. In the instant case it is sought to be shown that there was no consideration for the mortgage which purported to convey certain premises and which recited a consideration of \$10. It has long been the firmly established law in this state that the recital of the payment of a certain consideration in a deed under seal may be contradicted for some purposes by parol but such contradiction will not be permitted for the purpose of invalidating the instrument as a deed of conveyance. Fug v. Hlax, 228 Ill. 87; Standard v. A. E. & E. Ry. Co., 320 Ill. 488; Ill. Cent. Ry. Co. v. Self,



37 Ill. 388; Morris v. Tilleen, 81 Ill. 607; Shamberlain v. Fernbach, 118 Ill. App. 148; Moffat Coal Co. v. Miller, 173 Ill. App. 448. In the For case it was sought to set aside a lease under seal which recited a consideration of \$1.00 by showing that there was in fact no consideration paid. The court there said, (pp.62-63): "They (appellants) say that courts of equity will always inquire into the real consideration of an instrument, and will set it aside if there was, in fact, no consideration paid. It is true that for the purpose of applying equitable principles and granting equitable remedies a court of equity will inquire into the real consideration of a contract, although it is under seal and recites a consideration, if the effect is not to impair the instrument as a conveyance. That is done in cases where specific performance of a contract is asked for, (Grandall v. Willig, 188 Ill. 235) and other cases resting on like principles. But while the recital of the payment of the consideration in an instrument may be contradicted for such purposes, an acknowledgment of such payment cannot be contradicted by parol for the purpose of invalidating the instrument or impairing its legal effect as a conveyance. (Standard v. Aurora, Elgin and Chicago Railway Co., 230 Ill. 469.)" In the Standard case the court said, (p.475): "While the recital of the payment of the consideration in a deed may be contradicted for certain purposes, yet such acknowledgment of payment cannot be contradicted by parol for the purpose of wholly invalidating the deed or impairing its legal effect as a conveyance." Under the authorities cited and many others where the same rule is announced, we think it clear that the defendants could not show that there was no consideration for the mortgage, for the reason that their purpose in doing so was to destroy its ef-

The first of these is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The second is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The third is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The fourth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The fifth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The sixth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The seventh is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The eighth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The ninth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The tenth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood.



fect as an instrument of conveyance. Furthermore, we think there was consideration flowing to the defendants. While it is the general rule of law that a bond, executed at the time of the execution of the contract performance of which the bond secures, requires no additional consideration, the consideration running to the principal being sufficient, yet it seems to be the law that after the principal has fully executed his contract additional consideration is necessary to give legal effect to the bond to bind the surety. Field v. McCullough, 20 Ill. App. 381. In that case, Mr. Justice Bailey, afterwards a member of the Supreme Court of this State, delivering the opinion of the court on a somewhat similar proposition, said, (p.392): "Undoubtedly a consideration running to the principal alone co-temporaneous with or subsequent to the promise is sufficient, but the rule is different where the only consideration running to the principal is one which is already fully executed. See Brand on Suretyship, secs. 8 - 10." In the instant case the contract between Kiesel and complainant was not fully executed at the time the mortgage was given, for Kiesel continued to work for complainant and was paid his salary or commissions for about seventeen months after the execution of the mortgage. There was, therefore, sufficient consideration under the rule announced in the Field case.

Defendants next argue that their motion, supported by affidavit, for a jury trial should have been allowed. It appears that before the case was at issue defendants filed a motion, supported by affidavit, setting up various reasons why they were entitled to a jury trial, which motion was denied. Even if we assume that certain matters involved in the case were proper for the consideration of a jury, yet it was within the





discretion of the Chancellor to grant or deny the motion as a trial by jury in such cases is not a matter of right.

Bedraff v. Mang, 251 Ill. 531; Lurac v. Branch, 349 Ill.

394. We think the court did not err in denying the motion. It is further argued that the court erred in admitting in evidence certain receipted invoices for merchandise sold by Kissell and for which payment was alleged to have been collected by him. The invoices were stamped paid with a rubber stamp and bore Kissell's signature. As we understand the evidence Kissell collected sums of money from several of complainant's customers and gave them receipted bills. These were offered in evidence to prove the amount of Kissell's defalcations. It is claimed that there was no proof of the signature on some of the invoices. We think there was <sup>no</sup> error in the admission of the invoices since there was testimony to the effect that the signatures on the invoices were Kissell's. However, it was admitted that his genuine signature was in evidence and the court was, therefore, justified in finding as a fact that all of the signatures were genuine.

Defendants further argue that there is prejudicial error in the record for the reason that on February 24, 1915, complainant first learned that Kissell was not turning in money he collected; that the evidence shows that he collected \$142.79 from one of complainant's customers on February 22 and that the knowledge of this fact came to complainant two days later; that most of the amounts collected by him and which he failed to account for but converted to his own use were collected and converted by him after February 24; that in these circumstances it was the duty of complainant to discharge him at once and that its failure to do so relieved defendants of



liability for defalcations made after that date. Even if we assume that the law is as counsel contends, we think it could not be availed of in the instant case for the reason that the evidence tends to show that while complainant did have some knowledge on February 24 that Kissell had failed to turn in all the money collected by him, yet the evidence shows that upon receipt of information to this effect the complainant immediately began to check up and ascertain the fact. They questioned Kissell and he denied that he had made such collection. An investigation was made and completed about March 1, at which time it was definitely learned that Kissell was a defaulter. About this time Kissell disappeared and has not been seen nor heard from since. In these circumstances we think it cannot be said that complainant knew Kissell was a defaulter on February 24 and that it did not act promptly in discharging him. We think the evidence warrants the conclusion that they acted promptly and reasonably.

Defendants further argue that the trust deed should have been released for the reason that it provided in the event of the termination of the contract of employment prior to January 1st, 1916, it should be released and that the contract was so terminated; that the defendants tendered the usual release fee to the trustee and requested the release. Obviously, this point has no merit for, of course, the trust deed should not be released on January 1st, or any other date until any liability under the bond had been satisfied.

It is also claimed that the court erred in permitting a witness to testify to the account between Kissell and com-





plainant, since the witness was not the bookkeeper. We think this point is well taken. Although this witness testified that the defalcation amounted to more than \$2,000, we think this was clearly a conclusion. We have checked over the figures and find that the seventeen invoices, showing accounts which Kissell collected and failed to account for, amount to \$907.14. To this must be added the amount of his check, which was worthless, for \$945.86, and also the Howels account of \$142.79. These items make a total of \$1995.79. We think this is the sum total that the evidence shows Kissell collected and did not account to complainant for. The decree will, therefore, be modified and judgment will be entered in this court in favor of complainant and against the defendants for \$1995.79. Each party will be required to pay their own costs in this court.

DECREE MODIFIED AND AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.



486 - 25747

ANTON J. CERRAK,

Appellee,

v.

HAHEL, ARMSTRUSTER & LARSON  
COMPANY, a corp., and A. E.  
BLUM,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 656

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Tony Conciamilla brought an action against defendants on a replevin bond. The defendant Blum was not served and did not enter his appearance. The defendant served, who was the principal in the replevin bond, filed an amended affidavit of merits which, on motion, was stricken. Later it asked leave to file a further amended affidavit of merits which motion was denied and defendant was defaulted. Thereafter the court assessed damages against the defendant in the sum of \$391.50. A judgment in debt of \$600, the amount of the bond, was entered to be discharged upon payment of the damages, to reverse which the two defendants appeal.

The record discloses that on December 16, 1916, the defendant, Habel, Armbruster & Larsen Company, the principal in the replevin bond and the only defendant served, filed its amended affidavit of merits. This was stricken on motion of plaintiff. Afterwards on December 27 defendant moved to vacate the order striking the affidavit, which motion was denied, and on the following day it asked leave to file another amended affidavit which the court also denied. It was afterwards de-



faulted and on February 3, 1919, on motion of plaintiff all papers in the case were amended by substituting the bailiff of the Municipal Court, Anton J. Cermak, as plaintiff in lieu of Tony Candelasilla. The case was then heard and plaintiff's damages were assessed at \$197.40, and judgment of \$600 in debt was entered to be satisfied upon payment of the damages. An appeal to the Appellate Court was prayed and allowed both defendants, the appeal bond and bill of exceptions to be filed within thirty days. This bond was approved and filed February 27, 1919. On March 3 following the court, on motion of plaintiff, vacated the judgment of February 3 and reinstated the case. Afterwards on June 19 there was a re-trial of the cause and plaintiff's damages were assessed at \$391.50, and a judgment in debt for \$600 to be satisfied upon payment of the damages was entered. This was on June 26. The bill of exceptions shows that defendant, Habel, Armbruster & Larson Company, prayed an appeal to this court which was allowed. The record, however, as written by the clerk showed that the judgment was against both defendants and that they both prayed an appeal. The time for filing the appeal bond was fixed at thirty days and for the bill of exceptions sixty days. The plaintiff having discovered that the judgment of June 26 was against both defendants, although Blum had never been served, on July 9 moved that the judgment be corrected so as to eliminate Blum. This motion was entered and continued on account of the absence of the trial judge who lived in another county. On August 5 the motion was allowed and the judgment corrected. In the meantime, on July 10, defendants had their appeal bond approved and filed.

Defendants contend that the court erred in striking the amended affidavit from the files and in refusing leave to





file the other amended affidavit submitted. It is stated in the record that the reason of the court for striking this affidavit and refusing to permit the second one to be filed was that neither of these stated a legal defense. The question before us, therefore, is whether either of these two affidavits stated a legal defense to plaintiff's claim. The amended affidavit stricken set up that defendant had a good defense to the whole of plaintiff's claim; that the defense was that the "defendant at all times had a valid mortgage upon the property referred to in the plaintiff's statement of claim; that the replevin suit set out in the plaintiff's statement of claim did not adjudicate the validity of the mortgage of the defendant upon said property; that following the said replevin suit and the judgment therein, this defendant tendered to the said plaintiff the said property described in the said plaintiff's statement of claim, and offered to return the same, but that the said plaintiff refused to accept the return of the said property; that following such refusal of the said plaintiff to accept the return of the said property, this defendant sold the said property by virtue of the power of sale contained in the said chattel mortgage, that the value of said property so sold was not the sum of six hundred dollars, but was less than the amount due to this defendant under said mortgage." The other amended affidavit which the court afterwards refused defendant leave to file, set up substantially the same defense and the additional averment that plaintiff's damages, other than for failure to return the property replevied, such as attorney's fees, costs, etc. did not exceed \$25. We think it clear that neither affidavit set up a legal defense to plaintiff's claim. While it is true that after a writ of returam habenda is awarded in a replevin



suit the plaintiff in that case is entitled to return the goods taken in mitigation of damages, yet we think it clear upon a careful consideration of the two affidavits that the defendant's position was that it had a right to sell the goods despite the writ of retorno by virtue of the chattel mortgage and that it also had a right to retain the proceeds of the sale. Even if defendant had offered to return the goods it could not be warranted in selling them and appropriating the proceeds in the event of plaintiff's refusal to accept them. The affidavits were further insufficient because they failed to set up why the validity of the mortgage was not determined in the replevin suit. Section 26 of the Replevin Act is as follows: "When the merits of the case have not been determined in the trial of the action in which the bond is given, the defendant, in an action on the replevin bond, may plead that fact and his title to the property in dispute in said action of replevin." The defendant attempted to bring itself within this section by alleging that the validity of the chattel mortgage, which it at all times held on the goods in question, had not been determined in the replevin action. This allegation was clearly insufficient. It was a mere general averment. Enough of the proceedings in the replevin suit should have been stated in the affidavits to enable the court in the suit on the bond to determine whether the merits of the suit in replevin had been adjudicated. It should have shown what the issues in that case were and what disposition was made of them. King v. Ramsey, 15 Ill. 619. The King case was a suit on a replevin bond. In passing on the sufficiency of the fourth plea, which alleged that the property replevied was the property of plaintiffs in the replevin suit and that the merits of the case were not fully determined on the trial of that action, the court said, (p.623): "The plea was





clearly defective in not showing why the merits of the case were not determined in the action of replevin. A party claiming the benefit of the statute must affirmatively show by his plea that the case is within its provisions. Mere general averments will not suffice. Enough of the proceedings in the former action should be set forth to enable the court to decide on demurrer whether the right of property has already been determined. If the suit was dismissed, that fact should be stated. If there was a trial, the plea ought to show what were the issues, and how they were disposed of." From this rule, which has never been departed from so far as we have been able to learn, it is clear that both affidavits of merits were clearly insufficient. On the trial the defendant offered in evidence the chattel mortgage and the note which the court excluded. Of course, this was the only proper ruling on such offer since the affidavit had been stricken.

Complaint is also made to the order of court substituting the bailiff of the municipal court in place of Tony Candiamilla, the usuer, in the bond. The record fails to show that defendants made any objection when this order was entered. And, even if they did, their contention would still be unsound for the bailiff was the proper party to maintain the suit. The point is without merit.

Defendants also urge that the court erred on March 3, when it set aside the judgment entered February 3 for the reason that in the interim an appeal had been prayed to this court and the appeal perfected by the filing of an appeal bond. This order was not complained of by the defendants or either of them, and the defendant proceeded with a re-trial of the



cause in the following June without any objection and cannot now be heard to complain. They further insist that the court again committed error on August 5 when it amended the judgment of June 20 because the record discloses that on July 19 the defendants had filed an appeal bond perfecting an appeal to this court. In support of this it is argued that where an appeal is prayed, allowed and perfected by the filing of an appeal bond the trial court is without jurisdiction to enter any further orders in the case. This is the general rule of law but it has its exception which permits the trial court during the term at which the judgment was entered to vacate the order allowing the appeal and approving the appeal bond and to grant a new trial or enter such other orders as may be proper. Einkelshtein v. Lyons, 286 Ill. 27; Bridges v. Evans, 163 Ill. 36. The order of August 5 correcting the judgment of June 20 did not formally set aside the order allowing the appeal and approving the bond, yet no point was made of this in the trial court and it was but an irregularity, because this was the effect of the order. But defendants further say that while the plaintiff's motion was to amend the judgment of June 20 the order actually entered amended a judgment of June 19. While the record shows that the judgment sought to be amended was entered on June 20, it is admitted that there was but one judgment and although the bill of exceptions seems to indicate that this was entered on June 19 it actually was entered by the clerk on June 20. It being conceded that there was but one judgment the defendants are in no position to complain.

The judgment of the Municipal Court of Chicago is affirmed.  
TAYLOR, B. J. AND THOMSON, J. CONCUR.

AFFIRMED.





30 - 25783

DUNCAN MINES.

Plaintiff in Error.

v.

BRAITHWAITE-WEINBERG CO., a  
corporation,

Defendant in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 656

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff, the payee of a note for \$1500, dated  
October 12, 1916, brought suit against Jacob S. Weinberg,  
the maker, and Braithwaite-Weinberg Co., a corporation,  
guarantor. Weinberg was defaulted for want of an affidavit  
of merits and judgment was entered against him for the amount  
claimed, \$1581.03. The cause was reversed and went to trial  
against the other defendant. At the close of plaintiff's  
case there was a finding and judgment in favor of this defend-  
ant to reverse which this writ of error is prosecuted.

Plaintiff's statement of claim declared on the  
promissory note and upon the guaranty on the back of it,  
was as follows: "For value received, we guarantee payment  
of within note at maturity -- Braithwaite-Weinberg Co., By  
Jacob S. Weinberg, Pres."

The affidavit of merits filed by the guarantor set  
up that the guaranty on the note was the personal guaranty of  
Jacob S. Weinberg; that the "note was given as part purchase  
price of certain shares of corporate stock bought by said



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Weinberg for his own use from the plaintiff and that plaintiff knew at the time of such purchase that said Weinberg bought said stock for his own use"; that the guaranty was never authorized by the defendant and was not its act, but the unauthorized use of its name.

The evidence tends to show that plaintiff owned all of the stock (91 shares) in the National Sample & Color Company, a corporation organized under the laws of this state to do a general printing and manufacturing business; that the defendant Weinberg was interested in the defendant corporation organized to conduct a similar line of business; that about eight months prior to the date the note in question was executed and delivered, certain presses, type and equipment of the National Sample & Color Company was taken to the premises occupied by the defendant corporation and that thereafter plaintiff and Weinberg conducted their business together, plaintiff at one time being secretary of the defendant company. Afterwards plaintiff and Weinberg had a disagreement and on October 18, 1916, the note in question was executed and delivered to plaintiff together with the written guaranty. At the same time, plaintiff, Weinberg and the defendant company executed an agreement which recited that plaintiff, in consideration of \$8948.18 paid to him by Weinberg, released and discharged Weinberg and the defendant corporation from all claims with the exception of the promissory note in suit, and further released Weinberg and the defendant company "from any claim arising out of the transfer of property of National Sample & Color Company either to said Weinberg or Breitwais-Weinberg Company." The agreement further provided that the defendant released plaintiff from all claims except the documents entered into of even date. At the same time the defendant



corporation executed an assignment to Mines of a suit which it had then pending in the Circuit Court of Cook County wherein it claimed \$2448.18 from one Mitchell. The evidence further tends to show that at the same time and as part of the consideration moving to plaintiff there was surrendered to him his note for \$500 which the defendant company held. The record also discloses that on or about October 13, 1917, the American Sample and Printing Company was incorporated under the laws of this State, and in the papers filed with the Secretary of State it was recited that all the property belonging to defendant corporation had been turned in in payment of capital stock of the new company.

The trial court in effect held that if the transaction was the sale of the 91 shares of stock by plaintiff to the defendant, Weinberg, then the act of the corporation in guaranteeing the note in question was ultra vires and void and that Weinberg, so far as the evidence disclosed, had no authority to surrender the \$500 note and assign the suit in the Circuit Court to plaintiff. The court further held that if the transaction be considered as though the sale of the stock in the National Sample and Color Company by plaintiff was made to the defendant corporation, the transaction would be void because under the laws of this State one corporation cannot hold stock in another corporation. We have no fault to find with the propositions of law enunciated by the learned trial judge in his decision of the case, which appears in the record, but we think they are not applicable to the facts in the case before us. The only defense set up in the affidavit of merits was that the guaranty written on the back of the note was the individual guaranty of Weinberg and was not authorized by the defendant company.





But in any event, if it appears from the evidence that the transaction between the parties was in effect a sale and delivery of the chattels of the National Sample & Color company to the defendant corporation, then, of course, the guaranty would be binding and valid. The court will look to the substance of the transaction and if it appears that the defendant company received the chattels of the National Sample & Color company, then it would be bound by the written guaranty. Lake Street Elevated R. R. Co. v. Carmichael, 184 Ill. 348. The evidence does not clearly show this situation. It is apparent that the facts were not well presented, but the evidence does show that the defendant company had possession of the chattels of the National Sample & Color Company but just what the transaction was and how it came by them was not fully developed. All of this can be shown on a re-trial of the case.

Plaintiff called a witness under section 33 of the Municipal Court Act for cross-examination and on objection of defendant the court refused to permit the examination unless it was shown that the witness was an agent of the defendant company. Counsel for plaintiff contends that this was error for the reason that the witness swore to the affidavit of merits filed by the defendant and, therefore, he became a witness in the case. Of course, this argument is unsound, but we think the court should have permitted the cross-examination of the witness under section 33 for the affidavit of merits recites that the witness was secretary of the defendant company and he testified that he continued to act as its secretary until its "liquidation". If this means until the company ceased to do business we think the witness came with-



in the provisions of section 23.

Plaintiff also attempted to show by a witness what took place at a meeting of the directors of defendant company. This was objected to on the ground that the corporate record of the meeting was the best evidence. The objection was sustained. We think this was error as corporate acts can be proved as well by parol as by written entries. Bradley v. State, 138 U.S. 417, sec. 1847, 2 Thompson on Corporations (2nd Ed.); Moore v. Averell, 10 N.Y. 449.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE,

TAYLOR, P.J. AND THOMSON, J. CONCUR.

THE UNIVERSITY OF CHICAGO

CHICAGO, ILLINOIS

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO  
FROM THE DEAN OF THE FACULTY  
SUBJECT: A REPORT ON THE PROGRESS OF THE FACULTY  
DURING THE YEAR 1900-1901  
The Faculty of the University of Chicago has the honor to acknowledge the receipt of your letter of the 10th inst. and to inform you that the same has been forwarded to the appropriate committees for their consideration. The Faculty also wishes to express its appreciation of the interest and assistance of the President in the work of the University.

Very respectfully,  
THE DEAN OF THE FACULTY

THE UNIVERSITY OF CHICAGO

CHICAGO, ILLINOIS

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO

FROM THE DEAN OF THE FACULTY

SUBJECT: A REPORT ON THE PROGRESS OF THE FACULTY

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The Faculty of the University of Chicago has the honor to acknowledge the receipt of your letter of the 10th inst. and to inform you that the same has been forwarded to the appropriate committees for their consideration. The Faculty also wishes to express its appreciation of the interest and assistance of the President in the work of the University.

Very respectfully,  
THE DEAN OF THE FACULTY

THE UNIVERSITY OF CHICAGO

CHICAGO, ILLINOIS

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO

FROM THE DEAN OF THE FACULTY

SUBJECT: A REPORT ON THE PROGRESS OF THE FACULTY

DURING THE YEAR 1900-1901

47 - 25811

THE PEOPLE OF THE STATE OF ILLINOIS.)

Defendant in Error,

v.

DAVID HARMAN.

Plaintiff in Error.

WRIT TO

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 656

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error David Harman seeks to reverse a judgment of the Municipal Court of Chicago finding him guilty of carrying concealed upon his person a loaded revolver "without first having procured a written license from the General Superintendent of Police of said city as to do, in violation of Section 4 of Senate Bill 92 in force and effect after July 1, 1919." After finding defendant guilty the court imposed a fine of \$500 and sentenced him to six months in the House of Correction.

While the information charges defendant with the violation of Section 4 of Senate Bill 92 both parties have treated this as though the charge was that the defendant had violated section 4 of an Act to revise the law in relation to carrying deadly weapons, (Laws of 1910, p.422.) We shall, therefore, assume that the information charges a violation of the statute.

Defendant contends that the venue was not proven; that the date on which the offense was alleged to have been committed does not appear, and that on the whole the evidence





1910 1911 1912 1913

THE FOLLOWING TABLE SHOWS THE RESULTS OF THE SURVEY OF THE FISH AND GAME RESOURCES OF THE STATE OF TEXAS, FOR THE YEAR 1913.

The following table shows the results of the survey of the fish and game resources of the State of Texas, for the year 1913. The table is divided into two main sections, one for fish and one for game. Each section contains a list of the resources and the number of each resource that was found. The table is as follows:

| Resource    | Number |
|-------------|--------|
| Fish        |        |
| Bluegill    | 100    |
| Crappie     | 50     |
| Catfish     | 20     |
| Shiner      | 15     |
| Game        |        |
| Deer        | 10     |
| Antelope    | 5      |
| Wild Turkey | 3      |
| Quail       | 2      |

The following table shows the results of the survey of the fish and game resources of the State of Texas, for the year 1913. The table is divided into two main sections, one for fish and one for game. Each section contains a list of the resources and the number of each resource that was found. The table is as follows:

| Resource    | Number |
|-------------|--------|
| Fish        |        |
| Bluegill    | 100    |
| Crappie     | 50     |
| Catfish     | 20     |
| Shiner      | 15     |
| Game        |        |
| Deer        | 10     |
| Antelope    | 5      |
| Wild Turkey | 3      |
| Quail       | 2      |

does not prove the guilt of defendant beyond a reasonable doubt.

Alex. Gasparuk testified that "about one o'clock in the morning on 32nd street, on the south side of the street, between Hubbard avenue and Michigan avenues, I noticed the car there and there were four men in it and we stopped about 100 feet from it"; that they pulled up to the car and took four men out of it, one of whom was the defendant. The witness further testified: "I found this little gun right in front of the folding up seat, in the rear end, on the right hand side of the car, and the big one right on the corner of the seat in the same car"; that the big revolver was found "right by Harman" and the small revolver was "right in front of Sucky." On cross-examination he testified that the large revolver was not found on the person of the defendant but alongside of him on the seat; that both revolvers were loaded. Michael Hughes testified that he was a police officer of the City of Chicago connected with the "detective headquarters." He testified that he knew Leonard Banks, one of the four men also on trial, was "connected with a bank robbery about two months ago". This evidence was not offered against defendant Harman but was offered and received against the other defendants who were apparently tried at the same time. The defendant, Harman, testified that he was a laborer employed by the City of Chicago; that two men whom he knew were sitting in the automobile in question and he got in the machine with them and a few minutes thereafter was arrested; that he did not have the revolver in question upon his person and that it was not his but that it was taken from underneath the cushion of the back seat of the car. This is



all the material evidence in the case.

It is apparent from a reading of the entire record that the facts were very meagerly presented. In the case of People v. O'Gara, 271 Ill. 132, where the charge was murder, the indictment alleged the killing occurred in Cook County, Illinois. The only proof of this was "that the killing of Flinski occurred at Burney Bros.' saloon, 3945 Lyman street or at the southwest corner of Lyman and Keeley streets". The court there said, (p.143): "There is no testimony in the record showing, by necessary inference, that the streets mentioned are in the City of Chicago or elsewhere in Cook County. There is no rule of law that requires this court to judicially know that those streets and numbers are in Chicago or anywhere in Cook County. Where the evidence in the record does not affirmatively show that the offense charged was committed in the county alleged in the indictment a judgment of conviction must be reversed, as has been frequently declared by this court." Under the law as announced in that case we are constrained to hold that the venue was not sufficiently proven in the case before us. Nor does the date of the alleged commission of the offense appear. Nor do we think, from the state of the record, that the evidence warranted the finding of the court that defendant had been proven guilty beyond all reasonable doubt. It does not appear how many passengers the automobile in which defendant was arrested would accommodate, nor where the four men who were taken from it were sitting at the time. All of this, however, can be cleared up on a retrial of the case.

For the errors indicated the judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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TOM TAGIAS and CONSTANTINE  
MAGGOS, doing business as  
TAGIAS & MAGGOS.

Appellees.

v.

CONSTANTINE GEANAKAKOS and  
GREGORIE ALIAS ANTONIOS  
GEANAKAKOS, doing business  
as GEANAKAKOS BROTHERS.

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 656

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiffs brought suit against defendants claiming  
a balance due for meats sold and delivered to defendants of  
\$759.67. There was a trial before the court without a jury  
and a finding and judgment in plaintiffs' favor for \$603.75,  
to reverse which defendants prosecute this appeal.

The record discloses that plaintiffs were engaged  
in the meat business and that the defendants conducted two  
restaurants in Chicago; that plaintiffs sold meats to defendants  
on a running account. There is no dispute as to the amount of  
plaintiffs' claim but the defense interposed was that it had  
been paid by one of the defendants executing and delivering  
to plaintiffs his promissory notes secured by a chattel mort-  
gage. The testimony on behalf of defendants was to this effect.  
Plaintiffs denied that they had ever received the notes or  
chattel mortgage and testified that they knew nothing of them.  
The court found in favor of the plaintiffs on this issue and  
after a careful consideration of the evidence in the record  
we are unable to say that the finding of the court is against



the manifest weight of the evidence. In these circumstances, of course, we cannot disturb the judgment.

The defendants make the further point that the judgment is wrong because the evidence does not establish that they were partners in the conduct of their business, the contention being that one of the defendants was employed by the other and was, therefore, not liable to the plaintiffs for the balance remaining due for the meats. The evidence shows that the meats were sold to the defendants; that they were billed for the goods and that they were both on the leases for the premises occupied by the two restaurants. It was further shown that the plaintiffs dealt with the two defendants and extended credit to both of them. Whether the defendants, as between themselves, were partners is immaterial in this case for it is clear to us that plaintiffs sold the meats to them.

It is apparent to us from the argument presented on behalf of the defendants and from an examination of the entire record that this appeal is prosecuted merely for delay, as plaintiffs contend. In these circumstances we are asked to affirm the judgment with damages. Being of the opinion that the appeal was prosecuted merely for delay, the judgment of the Municipal Court of Chicago will, therefore, be affirmed with damages in the sum of five per cent of \$603.75, or \$30.19.

AFFIRMED WITH DAMAGES.

TAYLOR, P.J. AND THOMSON, J. CONCUR.





GORDON-CLARK HANDWARE CO.,  
a corporation.

Appellant.

v.

ROBERT J. McLAUGHLIN, trading  
as ARMY COMPANY.

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 656

MR. JUSTICE O'CONNOR delivered the opinion  
of the court.

Plaintiff brought suit against defendant to recover \$174.13 for labor performed and materials furnished. The defendant admitted the amount of plaintiff's claim and interposed a set-off claiming that plaintiff owed defendant \$40.00. Defendant's claim was for electric light furnished by him to plaintiff at the rate of \$4.00 per month. To defendant's set-off plaintiff filed an affidavit of merits setting up that defendant's claim was based upon an oral contract not to be performed within a year and was, therefore, within the statute of frauds. The case was tried before the court without a jury and there was a finding and judgment entered in defendant's favor and against the plaintiff for \$29.87, to reverse which plaintiff prosecutes this appeal.

The facts as disclosed by the evidence, so far as it is material to state them, are these: plaintiff was a tenant of defendant occupying two stores under a lease which expired in 1923, after it had occupied the stores for some time the parties entered into an oral agreement whereby the landlord agreed to install certain lamp posts in front of





the building which was occupied by plaintiff and other storekeepers; that the tenant of each store was to pay his pro rata share of the cost of installing the posts and furnishing the light; that plaintiff occupied two stores and was to pay \$4.00 per month as its proportionate share of the expense.

The only point argued in plaintiff's brief is whether a letter written by plaintiff to defendant and the latter's reply thereto constitute a sufficient memorandum in writing to exclude the case from the operation of section 1, ch. 89, R.S., which provides that no action shall be brought to charge any person upon any oral agreement which is not to be performed within one year unless there is some memorandum or note in writing signed by the party to be charged or by such party's duly authorized agent.

In the view we take of the case we think it is unnecessary to decide this point, for it has been held that while an oral contract which is not to be performed within a year comes within the statute and is unenforceable, yet where such contract has been fully performed upon the part of the plaintiff and nothing remains to be done by the defendant except to pay money, in such case the statute of frauds does not apply and is unavailing as a defense. Engelwald v. Grochy, 128 Ill. 283; O. E. C. & St. L. Ry. Co. v. Reed, 129 Ill. 350; Hinchart v. Reed, 207 Ill. App.139. But counsel for plaintiff, apparently anticipating that the defendant would contend that he had performed his part of the contract, and that, therefore, the statute would not apply, has argued that the contract being void under the statute no recovery could be had except upon a quantum meruit for the labor and materials actually furnished.



In support of this the case of Wilson Attachment Co. v. Davis & M. Co., 142 Ill. 184, and other cases cited. In that case the court said that the suit was brought "to recover rent for a term during which the premises were not actually occupied by the party against whom the recovery is sought", and this was one of the grounds on which the court there distinguished that case from the case of Rebster v. Hildale, 104 Ill. 180, while in the case at bar the set-off claims \$4.00 per month for light actually furnished. In the McC Donald case, which was a suit brought on an oral contract whereby the defendant promised to re-pay plaintiff \$14,000 which obligation was not to be discharged within a year, it was held that the statute of Frauds did not apply. The court there said, (p.339): "It is insisted that the court erred in sustaining the demurrer to the plea setting up the Statute of Frauds. The first plea is, that the promise declared upon was not to be performed within one year \* \* \*. As to the first (plea), the demurrer was properly sustained, on the ground that the contract declared upon was fully and completely performed upon the part of the plaintiff, and nothing remained to be done by the defendants but to pay the money. (Quill v. Sage, 35 Ill. 22). We do not understand, under the rule in this State, that the Statute of Frauds can be interposed as a defense where the contract is fully performed on the part of the plaintiff - in other words, the Statute of Frauds cannot be availed of for the purpose of perpetrating a fraud." Since the landlord's claim was that he had furnished the light under the oral agreement and nothing remained to be done but the payment of the amount due by the tenant, we hold, under the rule laid down in the McC Donald case, that the statute of





There was no defense.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSEN, J. CONCUR.



197 - 25969

PAULINE THOMAS,

Appellee.

v.

THE ERWIN GREER AUTOMOBILE  
COMPANY, a corporation, et al  
On appeal of Erwin Greer Auto-  
mobile Company, a corporation.

Appellant.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

221 I.A. 657

MR. JUSTICE O'CONNOR delivered the opinion of  
the court.

Plaintiff brought suit against the Erwin Greer  
Automobile Company, a corporation, The Greer College of  
Motoring, a corporation, and Paul G. Heinemann to recover  
damages for personal injuries. The suit was dismissed as  
to the two last named defendants and there was a verdict and  
judgment against the Erwin Greer Automobile Company for  
\$1152.00, to reverse which this appeal is prosecuted.

The evidence tends to show that Heinemann, who  
lived in Woodworth, Wis. came to Chicago in June, 1918, to  
buy an automobile and for this purpose drove in his Ford  
car to the place of business of the Quality Rebuilt Car Co.  
on Michigan avenue near 24th street. He was there shown a  
second-hand Hudson car. For the purpose of inducing a sale  
one Burnett, a demonstrator of cars, took Heinemann in the  
Hudson and drove him around for a short time demonstrating  
the quality and condition of the car. After they returned  
Heinemann stated that he would look around at other sales-  
rooms but would probably return. Later on he did return and  
told the salesman in charge, one Carle, that he would buy  
the car shown in charge of Carle. That he would buy



the Hudson car for the price asked, \$750.00, upon the condition that the seller would provide him with an instructor to teach him how to run the car as he was unfamiliar with the operation of that particular make of automobile. This was agreed to and Heinemann gave Carle his check for \$450.00. The balance of the purchase price was to be paid by Heinemann turning in his Ford at an agreed valuation of \$300.00. Carle gave Heinemann a receipt or invoice in which it was stated that the "Quality Rebuilt Car Co., Unincorporated, sold to Heinemann" the car in question. Carle stated that he had not then an instructor but that if Heinemann would return an hour later one would be at his service. Heinemann left and returned at about 5:00 o'clock in the evening. Thereupon Carle told him to go with Burnett to their other place of business on Wabash avenue near 15th street. Burnett drove the Hudson and Heinemann the Ford to the Wabash avenue address. Heinemann there saw Erwin Greer, president of the defendant company, who asked him where he had purchased the Ford and upon being advised Greer investigated to ascertain whether Heinemann was the rightful owner. He also looked into his financial standing. He satisfied himself that Heinemann owned the Ford and then O.K.'d. the check for \$450.00 which Heinemann had previously given to Carle. Greer thereupon executed and delivered to Heinemann a receipted invoice showing that "The Erwin Greer Automobile Company sold to P. G. Heinemann" the Hudson Car. It was also recited in the invoice that all sales were subject to acceptance by Erwin Greer. A few days thereafter, when the check had gone through the banks, Greer, in accordance with their custom, made out another sales invoice in substantially the same language and mailed it to Heinemann at Woodworth, Wis. Immediately after Greer had O.K.'d the check and



The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident. The paper then proceeds to a discussion of the various theories of the origin of life. It is shown that the most plausible theory is that life arose from non-life through a series of chemical reactions. This theory is supported by the discovery of the first fossilized micro-organisms, which are believed to be the earliest forms of life. The paper concludes by stating that the origin of life is a problem that has fascinated mankind for centuries, and that it is one that will continue to fascinate us for many years to come.

satisfied himself that Meinemann was the owner of the Ford Burnett changed the Wisconsin license from the Ford to the Hudson and Greer told Burnett to take Meinemann out in the Hudson and instruct him in the operation of it. Burnett drove the car to a residential section of the city and then Meinemann took the wheel. Under the directions of Burnett he drove around for about 30 minutes and was instructed in the operation of it. After they had been driving for some time Meinemann endeavored to turn the car around in Calumet avenue but apparently lost control of it. It ran up on the sidewalk and struck and injured plaintiff. She was taken to a hospital and Meinemann was placed under arrest. After this suit had been filed Meinemann paid plaintiff \$1153.00 and received from her a covenant not to sue.

There is a dispute in the evidence as to whether the sale was made on condition that instruction in operating the car would be given Meinemann, and also as to what took place just prior to the accident. Meinemann testified that he was to have such instruction, and that he was unfamiliar with the city, and that there was a street car track and a considerable number of persons in the street near where the turn was to be made; that he requested Burnett to take the wheel as he was afraid he could not make the turn, but that Burnett told him how to shift the gears and how to make the turn. On the other hand there was testimony to the effect that the sale was made without any promise to furnish Meinemann instruction and that after the sale was made Burnett went with Meinemann, at the latter's request, to show him how to operate the machine as a mere favor. Burnett testified that when they reached the place where the turn was to be made



in Calumet avenue he requested Heinemann to let him make the turn but that the latter refused.

It was stipulated that no question would be raised in this court as to the amount of the damages. Defendant, however, argues that the sale of the automobile was made by the Quality Rebuilt Car Company and not by the defendant; that the Quality Company was unincorporated and owned by Erwin Greer, the president of the defendant corporation; that the business was separate and distinct from that of defendant except that the books of account of the Quality Company were kept by the defendant at its place of business on Wabash avenue; that in these circumstances defendant would be in no way liable for the injuries sustained by plaintiff.

We think the evidence would not warrant the conclusion drawn by the defendant, and after a careful consideration of all the evidence we think that, in the view most favorable to the defendant, the most that can be said is that whether the car was sold by the defendant was a question for the jury. But we are also of the opinion that the contention now made is an afterthought, for upon an examination of the record it appears that at no time during the trial was it contended that the sale of the Hudson car was not made by the defendant. This appears throughout the trial, in the taking of evidence, in the motions of the defendant to instruct at the close of plaintiff's evidence and again at the close of all the evidence, and from the instructions asked by defendant, some of which were given and some refused. At the close of plaintiff's case counsel for defendant moved to dismiss because there was a variance between the allegations of the declaration and the evidence. Counsel stated that the "evidence

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shows that the car was being operated by the owner. There was no relationship of master and servant. Mr. Heinemann was entirely independent. The owner of the car had a right to do as he saw fit. He paid for it. The car was no longer under our direction and the evidence shows clearly that he was operating the car and that our servant was not operating the car. \* \* \* The evidence shows that this car was operated at the time of the accident by one Heinemann, while the declaration alleges it was operated by the Erwin Greer Automobile Company.<sup>9</sup> This motion was renewed at the close of all the evidence. It is obvious, therefore, that on the trial of the case there was no contention made that defendant did not sell the car to Heinemann, and it follows that such a point cannot be urged in this court for the first time. We are further of the opinion that whether the sale was made on condition that Heinemann be furnished instructions in the operation of the machine was a question for the jury and we think the evidence was sufficient to sustain their finding.

Defendant also argues that it is not liable because the demonstrator or instructor, Burnett, was not its agent but was employed by the Quality Rebuilt Car Company, and that there could be no liability in any event for the reason that at and before the time of the accident the car belonged to and was under the exclusive control of Heinemann, and even if there was any negligence on the part of Burnett, it could not be attributed to defendant even if it were held that Burnett was in its employ. Upon a consideration of the evidence we think that the most that can be said is that whether Burnett was in the employ of the defendant or of the Quality Rebuilt Car Company was also a question for the jury. They found in favor of the plaintiff and we think the finding is fully warranted by the evidence.



We are also of the opinion that whether Burnett was negligent at and before the time of the accident and whether he was then engaged in the furtherance of his master's, the defendant's, business were questions of fact for the jury to determine. The evidence tends to show that the defendant agreed in consideration of the purchase of the car by Heinemann to furnish him instructions in the operation of it. In these circumstances we think we would not be at all warranted in disturbing the finding of the jury to the effect that at and before the time of the accident Burnett was a servant of the defendant and that he was engaged in the furtherance of the master's business. Such being the case defendant would be liable for Burnett's negligence. This is an elementary rule of law.

It is also said that the court erred in giving instructions submitted on behalf of plaintiff and refusing some of those submitted by defendant. No error is pointed out and in these circumstances, of course, it is not our duty to go through the record in search of erroneous rulings on the instructions. That is the duty of counsel. However, we have examined the instructions and find the contention untenable. Defendant does point out, however, that there was error in giving instruction 6 on behalf of plaintiff. This instruction was on the question of damages and we think it was proper. City of Chicago v. Babcock, 143 Ill. 358.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

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119 - 25373

PEARL C. FRIEND.

Appellee.

v.

GEORGE HENNEKER.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 657

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, whereby the plaintiff, Pearl C. Friend, sought to recover damages from the defendant, George Henneker, which she alleged had been caused by the negligence of the defendant's chauffeur, in so operating his automobile as to collide with hers and partially wreck it. The issues were tried before the court without a jury resulting in a finding for the plaintiff and a judgment in her favor for \$145, to reverse which the defendant has perfected this appeal.

The only point urged by the defendant in support of the appeal is that the finding and judgment of the trial court are against the manifest weight of the evidence. The plaintiff was driving her car south in Michigan Boulevard in the city of Chicago. Her mother was in the car with her and also two sailors in uniform. The defendant was going north in Michigan Boulevard with his chauffeur who was driving. The collision which gave rise to this action occurred just north of 42nd street, which crosses Michigan Boulevard at right angles. The plaintiff testified that as she approached 42nd street she was driving just west of the center of





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Michigan Boulevard; that there was a car a little ahead of her, which was about to turn at 42nd street and as she did not know which way it was going to turn she stopped her car; that she saw two cars coming north in Michigan Boulevard and approaching 42nd street; one car being near the <sup>east</sup> curb of Michigan avenue and the other car passing it on the outside; that the car ahead of her turned east on 42nd street and that the outside car coming north (the defendant's car) passed around the car which was turning east on 42nd street and then ran into the plaintiff's car; that her car was stopped at the time of the collision; that her mother was sitting next to her and the sailors were sitting in the back seat. It appears from the evidence that shortly before the time of the accident, the plaintiff passed these sailors who were walking in the same direction she was driving and she asked them to get in and ride. The plaintiff further testified that after the collision the defendant got out of his car and walked over to her car and swore at her; that after the defendant's car struck hers, the latter apparently slipped toward the center of the street and that the other car drove to the curb stone on the east side of the street and stopped; that at no time previous to the accident was she driving her car east of the center of the street. On Cross-examination she testified that as she approached 42nd street she was going slowly, - probably 12 to 15 miles per hour and that she came to a dead stop just north of 42nd street to see which way the car which was going south ahead of her was going to turn in 42nd street and that it turned east. The plaintiff's mother testified substantially as the plaintiff did. She stated that when the defendant's car struck the plaintiff's, the defendant's car was west of the center line of Michigan avenue; that



the plaintiff's car was at no time east of the center of Michigan avenue. On cross-examination the plaintiff's mother testified that their car was about 10 feet from the west curb line at the time of the collision and that they were "practically standing still". One of the sailors testified that the plaintiff had picked him and his friend up as they were walking on Michigan Boulevard and that they were going about 10 or 15 miles per hour until they reached 42nd street; that at that time there was a car ahead of them, the driver of which signalled that he was going to turn east, whereupon the plaintiff stopped her car on the right side; that there were two cars coming north and that one of them passed the car which was turning east and ran into the plaintiff's car which was then 10 feet from the west curb line; that he first saw the defendant's car when it was 6 or 8 feet away, coming about 20 miles per hour or faster; that it first struck the plaintiff's car opposite the driving seat and then scraped along the side of the car, taking off the back hub; that the plaintiff's car was not east of the center line of Michigan avenue and was at a dead stop at the time of the collision.

The defendant, Renneker, testified that he was in the printing and publishing business and that on the day in question he was driving to the depot, having about an hour to reach there; it was raining and as his car was crossing 42nd street, going north, he saw two machines about in the middle of the next block, coming south; that there were three machines going north, including his own; one 80 or 75 feet ahead of him and another about 100 feet behind him; that he called his driver's attention to the fact that the second car coming south was coming fast; that his own car







was going not over 8 miles an hour; that the plaintiff, whose car was the second one coming south, tried to cut ahead of the car ahead of her; that she drove out to pass and then apparently saw the cars coming north and then she tried to turn back behind the car she was following and as she did so her car "swung completely across, facing the east and west, skidded a hundred feet toward us, just escaping the car that was in front of us"; that the rear end of the plaintiff's car "slammed up against my car on the side and bounded off about ten feet. Her car was wholly on our right of way, she was driving at 35 miles per hour. She broke the whole side of my limousine, all the glass in it, broke the fenders off, broke the mud guards, both rear and front fender, knocked off the hub caps, broke my radiator, broke the headlight and bounded off the rear to the side"; that after the collision he got out of his car and went up to the plaintiff and said, "you are a dunce, don't you know you are exceeding all speed limits here? Why do you drive as you are on a day like this? Don't you know you shouldn't go at the most, over ten or twelve miles per hour?" The defendant further testified that the plaintiff's car was east of the center line of Michigan Boulevard and that his own car was within one foot of the east curb line when it was stopped. On cross-examination the defendant testified that when the plaintiff first began to skid she was about 100 feet away; that if she had not run into his car, her car would have turned completely around and faced northeast; that his car was up against the east curb as close as he dared to get and that it was completely stopped when it was hit; that the plaintiff was on the east side of Michigan Boulevard when



she tried to go around the car ahead of her. He also testified that the car which was going south ahead of the plaintiff's car, never turned east in 42nd street but went straight south in Michigan Boulevard and that after the accident the plaintiff's car lay about 12 feet from the east curb of Michigan Boulevard and fully 5 feet east of the center of the street. The defendant's chauffeur gave testimony as to the occurrence, which was in corroboration of the testimony of the defendant. He testified that he was driving not over seven or eight miles an hour and that plaintiff's car was going about 35 miles an hour; that it was a wet slippery day and as the plaintiff drove her car out, in an effort to pass the car ahead of her, the rear end of her car swung around and skidded into the defendant's car and bounded off about ten feet and came to a stop; that the defendant's car was about a foot from the east curb line of Michigan Boulevard. On cross-examination this witness testified that the plaintiff must have been about 75 feet away when she started to skid, when she tried to pass the car ahead of her; that when she first started to skid she was in the center of the street and skidded southeast into the defendant's car. One Benke, a police officer, testified that at the time of the accident he was standing at the corner of 57th street and Michigan Boulevard and upon learning of the accident he went up to 42nd street where he saw the defendant's car facing northeast, two or three feet from the east curb line and the plaintiff's car facing south within six or eight feet of the east curb line and entirely east of the center of Michigan Boulevard; that it was "about 40 to 42 feet" between the plaintiff's car and the west curb line. One Sullivan testified that he was credit manager for the Inland Steel Company; that at the time of the collision in question he was standing at the Sinclair Oil station which was located





on a vacant lot at the northeast corner of 42nd street and Michigan avenue; that he saw the plaintiff's car coming south, "going pretty fast, between 25 and 30 miles per hour"; that there was a car a little ahead of the plaintiff and the plaintiff started to go "sort of southeast and then it couldn't get by because there were other cars coming, and then started in the other direction and it sideswiped into the car going north. The tail end of the car going south due to the slippery pavement, banged into the car going north. Miss Friend's car was east of the center of Michigan avenue. After the accident I went down to the curb and both cars were on the east side of Michigan avenue, one car facing straight north and the other car facing southwest. Both cars were east of the center line of Michigan avenue. Miss Friend's car was 5 to 6 feet east of the center of Michigan avenue. The tail end of this girl's car was about 12 feet or so from the east curb." On cross-examination this witness testified that when he first saw the plaintiff's car it was going south right in the center of the street and that at that time the defendant's car was at 42nd street and about 6 feet from the east curb; that when the plaintiff's car skidded it went "maybe twenty-five or thirty feet. The back swung around and skidded south and east; it was east of the center of Michigan avenue before it started to skid. The car was still skidding when the collision occurred; I don't believe the (defendant's) car stopped it; it skidded some more."

The plaintiff, her mother and the sailor, testified that plaintiff and her mother were sitting in the front seat and the sailors in the rear. The defendant testified that he spoke to the plaintiff's mother when she was in the rear of the car and before anyone had got out of it.



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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy for the new year. The President, James Buchanan, is writing to the Congress, and he is telling them that he is going to do everything in his power to keep the Union together. He is also telling them that he is going to do everything in his power to protect the rights of the people. The letter is very long, and it is written in a very formal style. It is a very important document, and it is one of the most important documents in the history of the United States.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

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It will be seen that there is hopeless conflict in this testimony. The plaintiff and her mother testified to one set of facts and the defendant and his chauffeur to a totally different set of facts. The plaintiff was corroborated by the sailor, whom we do not consider as an entirely disinterested witness. He was riding in the plaintiff's car as her guest at the time of this accident and it would not be unnatural if he made every effort to support her version of the occurrence.

The only really disinterested witnesses in the case are the police officer and the witness Sullivan. We may consider that the testimony of the police officer is not of particular importance inasmuch as he was not an eye witness and merely described the conditions as he saw them when he arrived at the scene of the accident ten or fifteen minutes after it had occurred and it may be that there had been some change in the position of the cars during that time, although no such claim is made, but as far as the officer's testimony goes it corroborates the defendant. The testimony of the witness Sullivan, who saw the two cars before they came together, and observed the entire occurrence, is in entire accord with the descriptions of the accident given by the defendant and his chauffeur.

It is apparent from the record that the trial court, in deciding this case for the plaintiff, adopted the plaintiff's theory that at the time of the collision her car was west of the center line of Michigan Boulevard and that at no time was her car east of the center line. In our opinion the preponderance of the evidence was clearly the other way. The record also shows that the plaintiff was driving a

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comparatively light car and that the defendant's was a comparatively heavy car. While the plaintiff testified that after the collision the defendant drove his car over toward the east curb line, the defendant testified that his car was completely stopped when it was struck and after the plaintiff's car collided with his it skidded down to the south for a distance of about 10 feet and the witness Sullivan corroborated the defendant in giving his description of what occurred at the time of the accident.

On this state of the record and after a careful consideration of all the testimony, we are of the opinion that the finding of the trial court was against the manifest weight of the evidence and that the clear preponderance of the evidence shows that the defendant's chauffeur was guilty of no negligence and the accident was due wholly to the careless driving of the plaintiff and the judgment of the Municipal Court will therefore be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

#### FINDING OF FACT.

We find as a fact that the damage to plaintiff's automobile was not caused by the negligence of the defendant or his chauffeur but rather by her own negligence.

O'Connor, J. Concurs.  
Taylor, J. Dissents.

RECEIVED THE DIRECTOR  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C.  
JAN 10 1968



SEKULNI CEREK SLOVANEKYCH  
KATOLICKYCH KADETU, etc.,

Appellee.

v.

CYRIL JURCKA, et al. On appeal  
of JAMES F. HIRVINA.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 657

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff society entered into a contract with the plaintiff Jurcka, a sculptor, whereby the latter undertook "to make a plastic model in miniature representing Saint Vsevol seated upon a horse according to the model of sculptor Svirch of Prague, Bohemia," and if this was approved by a commission to be appointed by the society, he agreed to make an enlarged model to be submitted for approval and if the commission approved the enlarged model, he agreed to cast the statue in bronze and place it on a base to be erected by the Society in a cemetery at Niles, Illinois. By the terms of the contract the society agreed "to pay to the sculptor for the said work, the sum of Six Thousand (\$6,000) Dollars, in the following manner, to-wit: Five Hundred (\$500) Dollars cash within five days of the date hereof; Fifteen Hundred (\$1,500) Dollars to be expended by said corporation in making part payments upon a lot, and the erection within a reasonable time, of a suitable building thereon to be used as an atelier by the sculptor, title to said lot and improvements thereon to remain in said corpora-

# THE UNIVERSITY OF CHICAGO

1884-1885

## THE UNIVERSITY OF CHICAGO

The University of Chicago was founded in 1884, and has since that time been one of the leading universities of the world. It is a private university, and its funds are derived from the contributions of its alumni and friends, and from the income of its endowments. The University is organized into several divisions, and its courses of study are of the highest order. It is a place where the best minds of the world are gathered together, and where the most advanced researches in every branch of knowledge are being carried on. The University is a place of learning and of research, and it is a place where the future of the world is being shaped.

tion, or its agents as hereinafter provided; if less than Fifteen Hundred (\$1,500.) Dollars is expended by said corporation in payment of said lot and erection of said building, then the balance is to be paid to the sculptor, at the time that the title to said lot and building is transferred to the sculptor as hereinafter provided; Fifteen Hundred (\$1,500) Dollars to be paid when said statue is cast in bronze and is accepted by said corporation \* \* \*; Fifteen hundred (\$1,500) Dollars to be paid when said statue is placed upon said base \* \* \*, and the balance of one thousand (\$1,000) Dollars, thirty days after said statue is completely finished and delivered over to said corporation." By the terms of this contract it was further agreed that 60 days after the completion of the statue and its delivery to the plaintiff, "the title to the lot which is to be purchased as hereinbefore stated, as well as the improvements thereon shall remain vested in said corporation or its agent and that thereupon the said corporation shall convey the same to the said sculptor, subject to the payment of any unpaid balance that may be due upon said lot and that the same from thence on shall be the property of the said sculptor."

Following the execution of this contract, the sculptor gave the plaintiff an indemnifying bond with the defendant, Stepina, as surety. This bond referred to the contract, and its condition was that "if the said Cyril Jurecka shall from time to time, defend, save, keep harmless and indemnified, the said obligee, of and from all actions, suits, costs, charges, damages, loss and expenses whatsoever including attorney's fees, which may at any time hereafter happen or come to it by reason of the failure or refusal to perform and deliver said work





according to the terms of his contract with said corporation, then this obligation to be void; otherwise to remain in full force and effect."

The plaintiff brought this action in the Municipal Court of Chicago, against the principal and surety on the bond but the surety only was served and appeared. The issues were submitted to the court, a jury being waived, and the court made a finding for the plaintiff and entered judgment against the surety for \$3,931.33, to reverse which the defendant has perfected this appeal.

It is contended first that the plaintiff's statement of claim does not set up a cause of action and that the trial court erred in overruling defendant's motion in arrest of judgment, based on that ground. The statement of claim recited that the plaintiff's claim was for money due on an indemnifying bond, "Copy of which said instrument or indemnifying bond is hereto attached and marked Exhibit A"; that the defendants did not keep and perform the obligations of said bond but therein made default in that on August 4, 1914, the defendant Jurecka entered into a contract with the plaintiff, which is the same contract mentioned in the bond, "a copy of which said contract is also attached and marked Exhibit B"; that the plaintiff performed its part of the contract and the defendant "wholly failed and refused to perform" his part of the contract; that "the plaintiff, in performing its part of the contract, laid out diverse sums, to wit, \$3,000, in the purchase of a certain lot, erection of a building thereon, insurance, taxes, installations of gas pipes, upkeep, etc., and advance to Jurecka in accordance with the terms of the contract," and



1891

March 20/91

My dear Mr. [Name] [Address] [City] [County] [State] [Country]

Dear Sir,

I have the pleasure to acknowledge the receipt of your letter of the 17th inst. in relation to the [Name] [Address] [City] [County] [State] [Country] and to inform you that the same has been forwarded to the proper authorities for their consideration. I am, however, unable to give you any definite answer at this time, as the matter is still under consideration. I will, however, keep you advised of any further developments.

Very respectfully,  
[Signature]  
[Name]  
[Address]  
[City]  
[County]  
[State]  
[Country]

that by reason of the failure of Jurecka, to carry out the contract, plaintiff had been damaged to that amount. The various items making up the alleged damage were set forth in a bill of particulars. The copies of the bond and the contract, referred to, were attached to the statement of claim. They were necessary parts of the statement of claim and cannot be regarded as they might be if they were copies of instruments merely annexed to a declaration as exhibits, where the cause of action is stated in the declaration itself. Flew v. Board, 274 Ill. 232. The nature of the alleged breach of Jurecka is set forth sufficiently for the statement of claim alleges that he "wholly failed and refused to perform and deliver said work." In our opinion the statement of claim is not defective, as defendant claims.

The defendant farther claims that the plaintiff prevented performance of the contract. The first payment of \$300, called for by the contract, was made to Jurecka by the plaintiff, as the contract provided. With the concurrence and approval of Jurecka, the plaintiff purchased a lot in Berwyn, a suburb of Chicago, and erected a building thereon, to be used as a studio by Jurecka, in the execution of the work, called for by the contract. Before the studio was completed Jurecka suffered a fall and broke one of his hands. His health was so affected that he said his physician advised him to go to California, which he did. Before he went, he turned over a small bronze model of the statue in question to one of the officers of the plaintiff society. There was evidence from which the trial court might properly have concluded that this was a personal gift by Jurecka to the officer referred to. Jurecka testified, by deposition, that he had made this bronze model in Europe several years before the contract was entered into, and that no one connected with the plaintiff had known that it existed. Stopina testified that he told the attorney re-



presenting plaintiff that Jurecka was willing to proceed with the work in California if allowed to make the model there but that he wanted the bronze model which he had submitted to the plaintiff's committee, but that plaintiff refused to send it, and defendant contends that in the refusal, plaintiff prevented performance of the contract by Jurecka. In his testimony Jurecka did not take the position that he was prevented from making the miniature plastic model, called for by the contract, by reason of the refusal of plaintiff to send him the bronze model. He gave as the reason he had not proceeded with the work, the fact that "I never received any notice from these people in Chicago, (plaintiff) that they either approved or disapproved the model." It is apparent that, in turning over the bronze model referred to, Jurecka was not fulfilling any part of the contract. His agreement was to "make" a plastic model in miniature, not to submit a bronze model then in existence. The contract provided that the plastic model, as to be submitted, was to remain the property of the plaintiff. No such plastic model was ever made or submitted by Jurecka to the plaintiff. The plaintiff took the position that it was incumbent on Jurecka to execute the work in the studio which had been erected for him, under his supervision, under the terms of the contract, and not in California. Defendant contends that this was not necessary under the terms of the contract and that Jurecka should have been permitted to proceed with the work either in California or anywhere else that his artistic taste might dictate. We do not deem this point important for the evidence shows that in fact Jurecka did not perform the first thing to be done by him under the contract, namely, make and submit a plastic model in miniature, either in California or anywhere else and we cannot say from the evidence that this







failure on his part was due to anything the plaintiff did or failed to do.

The defendant further contends that he was released from liability on the bond because, in erecting the studio, the plaintiff expended more than the sum of \$1,500, mentioned in the contract. In our opinion this contention is not tenable. The facts involved in this contract are such that it bears no analogy to the building contracts involved in the cases to which the defendant has called our attention. The amount paid out by the plaintiff in providing the lot and building the studio, in excess of the \$1,500, mentioned in the contract, cannot be considered as any part of the \$6,000 compensation that was to go to Jurecka for the work to be done by him under the contract. The contract itself shows that the parties contemplated that the erection of the studio might involve more than \$1,500, for it provided that the title to the lot, "as well as the improvements thereon", was to remain in the plaintiff until 60 days after the completion of the studio and then was to be conveyed to Jurecka, "subject to the payment of any unpaid balance that may be due upon said lot." The words "said lot", as there used, must be considered as including the improvements. If, instead of allowing payments that were due to remain unpaid, the society chose to make them, we see no reason why it could not properly do so. Indeed the evidence shows that if the society had not done so, the contractors who were erecting the studio would not have completed it and it would have remained without a roof and exposed to the elements, and thus useless for the purpose contemplated and subject to serious damage and deterioration. But, although the amount paid out by the plaintiff, in buying the lot and erecting the studio, in ex-



sum of \$1,500, cannot be considered as payment by it to Jurecka, of any part of the compensation to be paid him under the contract, it constitutes a legitimate item of damage in such an action as this for it is a part of the "damage, loss and expenses", mentioned in the bond, which goes to plaintiff by reason of the failure of Jurecka to perform the contract, from which he did not keep harmless and indemnify the plaintiff, as the bond provided he was to do, in order to render it void. If Jurecka had fulfilled the contract and at the time provided in the contract, the lot and improvements erected thereon had been conveyed to him, under a reasonable and proper construction of the contract, that conveyance must have been made subject to all payments the plaintiff had made on the property, with the consent and approval of Jurecka, in excess of \$1,500.

Finally, the defendant contends that if the studio property, which the plaintiff held, was worth more than it had paid out under the contract, it had suffered no damage and so could recover nothing in this suit on the bond. The defendant sought to prove the market value of the lot and building in question, in an effort to show that such was the case, but the court sustained objections to this offer of proof and in this, the defendant contends the court committed error. Also it is contended that the judgment cannot be sustained, because it was incumbent on the plaintiff to prove its damages, and no evidence was introduced by it as to the value of the lot and studio. The defendant urges that in an action for breach of contract for the sale of real estate, the true measure of damages is the difference between the contract price and the

The following is a list of the names of the persons who have been appointed to the various positions of the Board of Directors of the American Society for the Advancement of Science, for the year 1887-1888. The names are arranged in alphabetical order, and are given in full, with the names of the persons who have been appointed to the various positions of the Board of Directors of the American Society for the Advancement of Science, for the year 1887-1888. The names are arranged in alphabetical order, and are given in full, with the names of the persons who have been appointed to the various positions of the Board of Directors of the American Society for the Advancement of Science, for the year 1887-1888.

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market value, and that plaintiffe cannot recover the contract price and still retain possession of and title to the property, and has called our attention to authorities to that effect. But that proposition is quite beside the point involved in the case at bar. Here we do not have a contract for the sale of real estate but one under the terms of which the plaintiff was to retain title to the property in question for the purpose of securing performance of the contract, and upon such performance Jurecka agreed to take the land, at \$1,500, subject to incumbrance as provided in the contract, in payment for his work to that extent. The plaintiff was under no obligation to go to the trouble of selling the property, in the event of the failure of Jurecka to perform, and sue the surety for the balance, if any, between the proceeds of the sale and the aggregate of the sums it had paid out under the contract. Nor is its right to sue or the extent of its possible recovery, affected by the relative amounts representing the sums paid out by it on the property, and its present market value, but it is entitled to recover of the surety on the bond, the damages it has suffered, treating the property as belonging to the surety, subject to the lien of the society for such damages. The Harmony Co. v. The Sanitary Drinking Co., 199 Ill. App. 414; Miller v. Thomas, 200 Ill. App. 123; Gray v. Mack, 199 Ill. 136; Cassid v. Skinner, 211 Ill. 229. That the plaintiff has offered to convey the property to the defendant surety, upon his payment of the judgment is shown by the record.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.





EQUITABLE SECURITIES COMPANY, et al,

(Complainant)

v.

MIDLAND CASUALTY COMPANY,

(Defendant)

APPEAL FROM

CIRCUIT COURT,

DEKALB COUNTY.

In re Petition of Charles A. White,

Appellee,

v.

EQUITABLE SECURITIES CO., a corp.,

Appellants.

221 I.A. 657

MR. JUSTICE THOMSON delivered the opinion of the court.

The Midland Casualty Company was an Illinois corporation, organized to do a casualty insurance business. It began business January 1, 1911. In the following September this company entered into a contract with the petitioner White, who was engaged in the business of selling limited accident and health insurance policies, by which it was provided that, for a period of ten years, the company would sell exclusively to White, "all coupon and special limited accident and health insurance policies issued by the company," having certain specified annual premium rates, which policies White would have the right to resell. The contract also covered the prices at which such policies were to be sold to White by the company and by the terms of the contract White bound himself to purchase policies, worth an aggregate of \$5,000 during the first year, \$6,000 the second year, \$7,000 the third year, \$8,000 the fourth year and \$9,000 the fifth and each succeeding year of the contract period. It was



Figure 1. The relationship between T. 1. 1. 1. and T. 1. 1. 1.

1908 - 1909

The following table shows the results of the experiments conducted in 1908 and 1909. The table is divided into two main sections: '1908' and '1909'. Each section contains a table with columns for 'Date', 'Time', 'Temperature', 'Humidity', 'Wind', 'Rain', 'Sun', 'Moon', 'Clouds', 'Wind', 'Rain', 'Sun', 'Moon', 'Clouds'. The data is presented in a tabular format, with rows corresponding to individual experiments. The table is organized into two main sections: '1908' and '1909'. Each section contains a table with columns for 'Date', 'Time', 'Temperature', 'Humidity', 'Wind', 'Rain', 'Sun', 'Moon', 'Clouds', 'Wind', 'Rain', 'Sun', 'Moon', 'Clouds'. The data is presented in a tabular format, with rows corresponding to individual experiments.

farther provided in the contract that the company was to pay White 15 per cent of its profit on the business as written and that the company was to qualify in certain states and also that the policy holders secured by White were to be considered his customers and were not to be solicited by the company.

The company and White did business under this contract until July 1, 1915, at which time the Midland Casualty Company reinsured all of its business with the Badger Casualty Company, a Wisconsin corporation. This reinsurance contract included all insurance contracts of the Midland Casualty Company and under it the Badger Casualty Company assumed all liability incurred subsequent to July 1, 1915 and to pay all losses thereafter sustained and all the expenses of operating the business. The Badger Casualty Company removed its principal place of business from Green Bay, Wisconsin to Chicago, occupying the office which had theretofore been occupied by the Illinois corporation, taking over all of its employees and records and changing its name to the Midland Casualty Company of Wisconsin. The White contract was turned over to the Wisconsin company and retained by it but no formal assignment of it was executed, although such an assignment was prepared by White early in 1916 and delivered to the Wisconsin company for its execution. Immediately after the Wisconsin company took over the business of the Illinois corporation under the reinsurance contract, White prepared forms of limited accident and health policies to be issued by the Wisconsin company, which were practically duplicates of those which had been issued by the Illinois company, and in due time these were furnished by the Wisconsin company and were sold by White in place of the policies

The first of these is the fact that the number of cases of disease has been increasing steadily since 1870, and this is due to the fact that the population of the country has been increasing steadily since that time. The second is the fact that the number of cases of disease has been increasing steadily since 1870, and this is due to the fact that the population of the country has been increasing steadily since that time.

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The ninth is the fact that the number of cases of disease has been increasing steadily since 1870, and this is due to the fact that the population of the country has been increasing steadily since that time. The tenth is the fact that the number of cases of disease has been increasing steadily since 1870, and this is due to the fact that the population of the country has been increasing steadily since that time.



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of the Illinois Company. Pending the furnishing of these new policies by the Wisconsin company and the admission of that company to do business in the states in which the Illinois company had been doing business, White continued to sell the policies of the Illinois Company. This was provided for by the terms of the reinsurance contract. All transactions by White as to such policies, were had with the Wisconsin company.

In May 1917, the Equitable Securities Company, A. S. Marks and J. L. Hamilton, stockholders in the Midland Casualty Company filed their bill against the company, under the provisions of the Act relating to insurance companies and their dissolution, asking for the appointment of a receiver for the company and a decree of dissolution, winding it up and distributing its assets among its stockholders. The solvency of the company was not questioned and, in no way, involved. The company immediately filed its answer, admitting the allegations of the bill and consenting to the appointment of a receiver. The court duly appointed Frank E. Joyner as receiver.

In August 1917, three months after the proceedings for the dissolution of the Illinois company were instituted, the Wisconsin<sup>Company</sup>/notified White in writing that it did not consider his contract with the Illinois company, binding upon it.

A month later White filed his petition, by leave of court, asking that his claim for damages growing out of the alleged breach of his contract by the Illinois company, be allowed against the receiver. This petition alleged that the Illinois company had ceased to do an insurance business and that by reason thereof, it could not carry out its contract with the petitioner and that the latter "is now and will be deprived of the profits from his said business, which he

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and with the approval of the Senate, the President may call into the service of the United States any number of militia of the several States, to execute the laws of the Union, suppress insurrections, and repel invasions. He may also call into the service of the United States any number of militia of the several States, to execute the laws of the Union, suppress insurrections, and repel invasions.

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otherwise would have made had said contract been performed according to its terms," by said Illinois Company. It alleged further "that the profits to your said petitioner from the business done by him under said contract were in excess of \$10,000 yearly," and it prayed that the petitioner's claim be allowed in the sum of \$140,000 and that the receiver be directed to pay the petitioner such sum out of the assets in his hands. The receiver was the only one who was made a party respondent to the petition.

The receiver filed his answer and, issue having been joined, the matter was referred to a Master, and after hearing he submitted a report finding that the petitioner, White, had been damaged by reason of the violation of his contract by defendant, the Illinois company, to the extent of \$8,500 and recommending the entry of a decree that the receiver pay the petitioner that amount. Objections and exceptions were duly filed to the Master's report by the receiver which were overruled, following which, an order or decree was entered in accordance with the Master's findings and recommendations. To reverse that decree, the complainant stockholders and the defendant Midland Casualty Company, (the Illinois company), being the respective parties to the original suit, have perfected this appeal.

Appellee contends that the assignments of error filed by appellants present no question for the consideration of this court, inasmuch as they filed no objections or exceptions to the Master's report. None of the appellants were made respondents to the petition by appellee. The only respondent was the receiver. In the original voluntary dissolution proceeding, the receiver was appointed as the custodian of the property and

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225476 of the corporation, and, although he may be considered as the representative of any creditors the corporation may have had, he must also be considered as the representative of the corporation and also of its stockholders, who were entitled to such assets as would remain in the receiver's hands, after the payment of all debts that might be proven to exist and all claims that might be allowed. The receiver filed his objections to the Master's report, which were duly considered and overruled by the Master and said objections were ordered to stand as exceptions to the Master's report, which were duly considered and overruled by the chancellor. In so doing, the receiver was representing the corporation and through it, its stockholders. Peabody v. Paper Works Company, 134 Ill. 625, 647, quoting with approval Gluck and Becker on Receivers, p. 177. Appellee is hardly in a position to contend otherwise at this time. He chose to make the receiver alone, partly respondent to his petition and he made no question of the right of the receiver to file objections and exceptions to the Master's report nor did he contend that such action should have been by the appellants here, and further he does not deny the right of appellants to the appeal perfected by them from the decree approving the Master's report and directing the receiver to pay appellee the sum of \$8,000. They are the only ones who could appeal from the order in question. The receiver would have no such right of appeal inasmuch as the order in no way affected his fees or disbursements or the settlement of his accounts. Foreman, Receiver, et al v. Deffoe, Gragg & Ritter, 120 Ill. App. 486; Smith v. Carroll, 127 Ill. 193. We hold that on the record made in this case as presented here, appellants have the right to avail themselves of the objections and exceptions



...and to show  
...the letter...  
...that on the record  
...the right to

~~120476~~ced by the receiver in the trial court.

The contract upon which this claim is based contained a paragraph in which the Midland Casualty Company agreed that during the period of the contract it would sell exclusively to White and to no one else, all coupon and all special limited accident and health insurance policies issued by it, having an annual premium rate of less than one dollar per one thousand dollars principal sum or five dollars weekly benefit. Appellant contends that this contract imposed no obligation on the company to issue such policies or continue doing so and that it had the right to abandon the issuance of such policies at the contract covered, at any time. With that contention we do not agree. By the terms of this contract, the appellee, White, obligated himself to purchase policies from the Midland Casualty Company to the amount of \$5,000 during the first year of the contract period, \$6,000 during the second year, \$7,000 during the third year, \$8,000 during the fourth year and \$9,000 during the fifth and each of the succeeding years. We must assume that the parties intended giving that language its normal effect. It would be without any effect whatever, if the contract imposed no obligation on the company to issue the policies which the appellee obligated himself to purchase. If he was bound to purchase to the extent indicated, during the contract period, the company was bound to sell to that extent and that obligation, of course, involved the further obligation to issue the policies which were the subject-matter of the contract. The thing which appellee obligated himself to do, by the terms of the contract, (buying the policies) could only be done upon a corresponding thing being done by the company, (issuing the policies and selling them to appellee) and therefore, the contract must be considered as

THE HISTORY OF THE UNITED STATES OF AMERICA

The history of the United States of America is a story of growth and development. It begins with the first settlers who came to the continent in search of a better life. These settlers found a land of vast resources and potential. They worked hard to build a new society, one that was based on the principles of liberty and justice for all. Over the years, the United States has grown from a small colony to a great nation. It has faced many challenges, but it has always emerged stronger and more united. Today, the United States is a world leader in many fields, and it continues to strive for a better future for all its citizens.

imposing an obligation on the part of the company to do that thing. This was a mutual contract under the terms of which appellee was obliged to purchase policies to the extent specified in the contract and the company was obliged to issue and sell such policies. Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534; Mississippi River Lumber Co. v. Johnson, 69 Fed. 773; Sanjour Furnace Co. v. McGill, 125 Ill. 656. When the Midland Casualty Company entered into the re-insurance contract with the Badger Casualty Company and ceased to conduct its insurance business and proceeded to wind up its affairs, it thereby disabled itself from performance of its executory contract with White and thereupon, in the absence of any novation, White had the right to treat the contract as ended and maintain appropriate proceedings for the recovery of such damages as he could prove were occasioned by the anticipatory breach of the contract by the Midland Casualty Company. Levy v. St. Louis Mutual Life Ins. Co., 111 U.S. 264, 274; Heckm v. Harst, 179 U.S. 1, 8; Central Trust Co. v. Chicago Auditorium Association, 240 U.S. 581, 589. In their brief, appellants argue that the law is a part of every contract, and the law provided that the legislature might prohibit the issuance of such forms of policy as made up the subject-matter of this contract, and that this, in fact, is what was done, for the legislature of this State, by an Act approved June 29, 1915, prohibited the issuance of the forms provided for in this contract. In connection with this argument no reference is made either to the abstract or the record, nor is it pointed out in what way the various policies issued by the Midland Casualty Company under this contract, conflicted with the State law to which reference is made. In the absence of further presentation of the matter, this court

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does not consider the point properly made and we do not pass upon it. However, the Act in question prescribes certain limitations on all policies of insurance against loss or damage from the sickness, or from the bodily injury or death of the insured by accident, which may be issued on and after January 1, 1916 "to any person in this State", and by section 10 of the Act it is provided that "the policies of insurance against accidental bodily injury or sickness issued by an insurer organized under the laws of this State may contain, when issued or delivered in any other state, territory, district or country, any provision required by the laws of the state, territory district or country in which the same are issued, anything in this Act to the contrary notwithstanding." Reference to the contract involved in this case shows that by its terms the company obligated itself to qualify to transact business in twelve states, which are named, by April 1, 1912 and in another state (Massachusetts) by July 1, 1912. What effect, if any, the Act approved June 29, 1913, had upon the issuance of policies by the company to persons in these states, is neither pointed out nor intimated. It would further seen from the record, that the re-insurance contract entered into with the Badger Casualty Company was not occasioned by the legislation to which appellants refer in their brief. The first written communication referring to the contemplated change in the organization of the Midland Casualty Company was received by White before the legislative Act in question was passed, namely on June 22, 1913. This letter was introduced in evidence as petitioner's Exhibit 7, but we do not find it set forth in the record. It seems that this change was contemplated some months before



this Act was passed, for officers of the company had talked with White about it, as early as February 1915.

In further support of this appeal, appellants contend that there was a novation of the White contract with the Midland Casualty Company (of Illinois) and also that, even if there was no valid novation of that contract, White, by his actions, showed that he had abandoned it, so far as the Illinois company was concerned. In our opinion it clearly appears from the evidence that there was no novation of the White contract. It would be essential to such a result that the evidence establish the fact that all the parties involved, agreed to the new contract. The John Heare Snow Co. v. Leaner, 194 Ill. App. 92; Harvard v. Murka, 151 Ill. 121. White was told by one of the officers of the Midland Casualty Company, that negotiations were pending between that company and the Badger Casualty Company, involving a change in the former company's affairs and that his contract would be taken over by the new company under the arrangement to be consummated. The re-insurance contract between the two companies was finally executed, effective as of July 1, 1915, but White testified he was not told what the terms of that contract were, until June 1915. The re-insurance contract made no specific mention of the White Contract, whereby the Midland Casualty Company transferred all of its business to the Badger Casualty Company, the latter taking over all the assets and assuming all the obligations of the former. White prepared a written assignment and acceptance of his contract which he submitted to the Badger Casualty Company for approval and execution by its officers but it was never executed and ultimately that company notified White that it did not consider his con-





tract in force as far as it was concerned. Officials of the Badger Company testified that that company had never had a contract with White. It appears that, after July 1, 1918, pending the preparation of forms of policies to be issued by the Badger Company to be sold by White, it was agreed that he might continue the sale of Midland policies, liability under which would be assumed by the Badger Company and further that when the latter company had completed preparation of its policies, White took up the sale of these policies and continued to sell them up to the time of the hearing of this case but in a number of respects the Badger policies differed from those which had been issued by the Midland Casualty Company. White's contract with the Midland Company included an agreement on its part, to sell the policies of the type covered by the contract, to White exclusively, in the territory involved, but that feature was not present in the sale of the Badger policies by that company to White. Although the White contract was delivered by the Midland Casualty Company to the Badger Company and the latter retained possession of it, it does not appear that in selling policies to White, it was acting under that contract. Although the evidence is not free from some conflict, we believe it warrants the conclusion that the facts were as above set forth. These facts do not establish the acceptance of the White contract or a new agreement by the Badger Company. In other words, they fail to establish a novation. Hoffman v. Chicago League Ball Club, 195 Ill. App. 248. The receiver had the burden of proof on that issue. The John Deere Plow Co. v. Looper, 194 Ill. App. 92; Hellerstrom v. Sellistal, 110 Ill. App. 358. We are further of the opinion that the evidence failed to establish that White had abandoned the





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contract, so far as the Illinois company was concerned. The fact that he sold policies issued by the Badger Company is not inconsistent with that conclusion. White cannot be said to have abandoned the contract when, in 1916, he endeavored to secure a formal assignment of his contract by the Badger Company, which was some time after that company had taken over the business of the Midland Company (of Illinois) during which period, White had been selling Badger Company policies. We are unable to see that anything that White did may be said to deprive him of the right to recover from the Illinois company, any damages he could show he suffered as a result of its breach.

Appellants contend further that error was committed in the trial court in fixing the damages allowed the petitioner. It is their contention, as we understand it, that the evidence shows that White was selling limited accident insurance policies issued by two or three companies other than the Midland Casualty Company during the period he was operating under this contract and subsequent to that time and that no evidence was produced to the effect that he could not obtain from these or other companies, the same policy forms he was to have under his contract here involved, or forms better than those, at the same price he was to pay the Midland Company under his contract or a less price, or that he had not, in fact, done so, the contention being that if the same or a better policy than he had contracted for with the Midland Company, could be purchased in the open market, from as good or a better company, at the same or a less price, then White must be held to have sustained no damage by reason of the failure of the Midland Company to furnish the policies contracted for. In other words, the appellants contend that White's proper measure of damages was the difference between the contract



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price, at which he was to obtain those policies from the Midland Company, and the price at which he did obtain these or better policies from other companies or the price at which he could have obtained them in the open market. That contention is not tenable. The policies of insurance involved in this contract cannot be considered as merchandise which could be purchased in the open market. White testified that the name of the company would have something to do with the selling value of these policies. Moreover, these policies which the Midland Company bound itself to furnish White at the prices fixed by the contract, were given a particular value by virtue of the provision in the contract whereby the Midland Company agreed to furnish these policies to White exclusively. This feature of the contract entitled him to the benefit he derived from the fact that it enabled him to sell these particular policies in twelve or fourteen different states without competition. If the fact was that White, following the breach complained of, secured or would have secured the same or better policies from a company or companies as good as the Midland Company or better, at the prices fixed in the contract, or at prices less than these and to the exclusion of all others in the territory covered by his contract with the Midland Company, it was incumbent on the receiver to show it. No such proof was made or offered. White testified that his business was ruined in the territory referred to, by reason of the fact that the Midland Company of Illinois violated the ninth paragraph of the contract, by the terms of which the company agreed that all persons to whom White sold policies should be considered his customers and their names should be treated by the company as confidential and it would use such names for no purpose





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other than keeping its records of policies issued and that it would not disclose such names to any other person, firm or corporation and further, that the company would never make any use of such names which would in any manner injure White's business and that it would never solicit or cause White's policy holders to be solicited, directly or indirectly, for any renewal, and he further testified that notwithstanding these provisions of the contract, the Midland Company (of Illinois) "turned my business over to the Midland Casualty Company of Wisconsin, gave them the knowledge of all my policy holders and agents", following which the latter company, "had gone into the business itself and disorganized me in my business and agents." On such breach, under the evidence to which we have referred, White's measure of damages was his loss of profits. It seems clear from the evidence that, in making this contract, the parties contemplated the profits White would make in the re-sale of these policies as well as the percentage the company was to pay him on each year's business. When profits are the object and inducement of the contract and are known to be such by the contracting parties, loss of such profits may be proven as the measure of damages for a breach of the contract if that can be shown with reasonable certainty. C. C. C. & M. L. Ry. Co. v. Wood, 189 Ill. 352; Barnett v. Caldwell Furniture Co., 277 Ill. 326; Smith Furniture Co. v. Vais, 245 Ill. App. 379. Appellants further contend that the damages White complained of in his testimony were not those he had alleged in his petition. In our opinion the allegations in the petition were broad enough to cover the proof. Furthermore appellants are not in a position to urge the point here as it was not raised when



the proof was offered.

It is contended further, in support of this appeal, that the petitioner did not prove his damages by consistent evidence. It appears from the evidence that a record of the policies sold by White was kept in a loose leaf record book called a Policy Register and that this was the original entry of the sale of the policies on White's books; that entries were made in this Register by six or eight different girls during the period White was selling these policies under the contract in question. One Larson, who was White's bookkeeper, testified as to the method of keeping this record and that he knew of his own knowledge that a record of policies of the Midland Company was kept in this Policy Register and that during the entire period, he had charge of the books, and the Register was kept under his supervision and that he knew of his own knowledge that the Midland policies were entered on this Register for he had posted the items from the Register to the ledger "and I checked every item." This witness produced the Policy Register showing the policies of the Midland Company which were issued from November 1911 to August 1917, consisting of 452 loose sheets which he testified had been removed from the covers or bindings in which they were kept in the office and that he had made a correct computation from these sheets, showing that the gross receipts from the sales of Midland policies, during the period in question was \$325,315.00 and that the commissions paid by White on these policies was \$127,315.67 and that he had further computed from these sheets and also the duplicate reports made by White to the Midland Company, which were in evidence, that the amounts White had paid the company on these policies during

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that period, was \$86,423.26. He also produced White's cash disbursement book showing all expenses incurred by White in conducting his insurance business, and he testified that this was a record of original entry and was correct, all items, with very few exceptions, being made by him personally and that he had computed from that record that the total expenses referred to, for the period in question, were \$84,683.78. Subtracting the amount White had paid out as commissions, the amount he had paid the company and his total expenses from the gross receipts, showed a profit for the period in question, amounting to \$26,883.27. In our opinion that was competent proof of that fact. That certain of the records produced were loose sheets and not bound in permanent book form, formed no proper objection to their use by the witness in making his calculations. Wylie v. Bushnell, 277 Ill. 484, 492. The witness White used certain memoranda in the way of computations he had made from White's books in connection with his testimony and he stated that in preparing these memoranda and making his computations he had made use, not only of the books and records which he had produced before the Master, but others which he had not brought to the Master's office. Appellants contend that it was error to permit the witness to testify as to computations he had made from the books of White unless these books were all produced and put in evidence. The course pursued before the Master was quite proper, as it would be in any case involving numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of an examination of all or many of them. Of course, the Master might have required the production of all the original books, so far as they were accessible, and





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should have done so, had the question been raised by counsel for the receiver during the hearing. People v. Gerald, 265 Ill. 448; Inter-state Finance Corporation v. The Commercial Jewelry Company, 230 Ill. 116. But the record in the case at bar shows not only that counsel did not raise this specific point but when counsel for White, at the close of the bookkeeper's examination offered "to have the other books about which the witness testified, produced, "counsel for the receiver, who is counsel for the appellants in this court, declined the offer saying, "I have no use for them at this time."

We come now to the consideration of the amount of damages allowed White on his petition, by reason of the company's breach of the contract. The amount of damages, as fixed by the Master, was apparently based upon the Master's conclusion that White's annual loss of profits for the four years of the contract period, following September 1, 1917, would be \$2,804. The Master indicated in his report that he reached this conclusion in the following manner. The evidence as to the amount of White's business, submitted by his bookkeeper, covering the period from the beginning of the contract down to September 1, 1917, showed that White was paying the company substantially 33 1/3 per cent of the total receipts and he was paying as his agent's commissions substantially the same proportion of his total receipts and further that his general expenses, outside of these two items came to 26 per cent of his total receipts. The Master then noted that White was obliged, under his contract, to do a business sufficient to enable him to pay the company \$9,000 a year during the last four years of the contract period and that as the evidence showed that he had been paying the company one third of his total receipts, the Master concluded that in order to enable White to meet his contract



obligation to the company of \$9,000 per year for the last four years, it would be necessary for him to do a business amounting to \$27,000 annually during that period. The Master apparently then proceeded on the assumption that White would do a business at least sufficient to meet his contract obligations and on that assumption the Master based his calculations, deducting from the total annual receipts of \$27,000, the sum of \$9,000, which White would pay the company and the further sum of \$9,000 which he would be obliged to pay his agents and the further sum of \$7,000, representing his other expenses, amounting to 26 per cent of the total, and thus reached the conclusion that on a business, sufficient in volume to enable White to meet his contract obligation of \$9,000 a year to the company, White would make an annual profit of \$2,000. In our opinion, there is no basis in the record for any such allowance of damages. We find no evidence, either showing or tending to show, or from which reasonable inference could be drawn, that, during the period of the four years referred to, White could do such a business as would enable him to meet just his contract obligations. We know of no rule of damages under which such a conclusion would be warranted.

Ordinarily, upon the breach of a contract such as the one involved in the case at bar, the party against whom the breach was committed would be entitled to his loss of profits for the period of the contract, following the breach. In estimating the plaintiff's loss in such a situation, can the court take into consideration the profits which he made under the contract during the period of its fulfillment? In some jurisdictions the courts have answered that question in the negative, holding that such evidence would be too speculative to be





admissible. Such was the ruling in Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534. But, the contrary rule has been followed in other jurisdictions, including our own. In the case of Bayley v. Smith, 10 N.Y. 409, a leading case on this subject, one partner sued another for a premature dissolution of the partnership in violation of their contract and the court held that the plaintiff's measure of damages was the prospective profits of the partnership to the end of the term. With regard to the admission of evidence of the amount of profits earned by the partnership preceding the dissolution, as bearing on the question of what the profits would have been had the contract of partnership been fulfilled, the writer of the opinion in that case said, "It seems to me quite obvious, that, outside of a court of justice, no man would undertake to form an opinion as to the prospective profits of a business, without, in the first place, informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature, entirely capable of correct ascertainment and proof, I can see no more reason why it should be excluded from the consideration of a tribunal, called upon to determine, conjecturally, the amount of prospective profits, than proof of the nature of the business, or any other circumstances connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of past profits. This difficulty is inherent in the nature of the inquiry; we shall not lessen it, by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry, by reason of its difficulty, when we remember, that it is the misconduct of the defendants which has rendered it nec-



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seamy." In Chapman v. Kirby, 49 Ill. 311, the plaintiff sued to recover damages for the destruction of his business by reason of the alleged misconduct of the defendants in cancelling a lease and cutting off the plaintiff's steam power which was included in the lease. The court held that the defendants, having committed the wrong, must be held liable for all losses that flow from it, including the loss of the plaintiff's business, and in this connection the court said, "And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And, to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes they would have been lost? Nor can we expect that in actions of this character the precise extent of the damages can be shown by demonstration. By this means they can be ascertained with a reasonable degree of certainty." Landis v. Wolf, 206 Ill. 392, was an action of debt upon an injunction bond in which the plaintiff sought to recover damages for injury to his business by reason of the wrongful suing out of the injunction. It was claimed on appeal that the trial court had erred in allowing the plaintiff any damages for injury to his business and loss of profits therein, while the injunction was in force, and in that connection the court said, "It is well settled that, in such cases, damages, which are remote, speculative and incapable of ascertainment, cannot be allowed, but where, by the issuance of an injunction, a business is unavoidably suspended and thereby injured, damages may be allowed. It may not be possible to show by demonstration the





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precise extent of the damages, but profits for a reasonable period next preceding the time, when the injury was inflicted, may be taken as the measure of such damages, and as the basis of an estimate thereof, leaving the other party to show that, by depression in trade or other causes they would have been less." In the case of Barnett v. Goldswell Furniture Co., 277 Ill. 286, the parties had entered into a contract by which the plaintiff agreed to sell \$100,000, gross, per year, of the output of defendant's factory, for a period of two years. The plaintiff brought suit, claiming that he had performed the contract for the first year, at which time the defendant had severed their contractual relation without just cause. On the question of the plaintiff's damages the court said, "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty. On the trial of this case the amount of sales made by plaintiff for a certain number of months prior to his discharge, was proved as a basis upon which to estimate his probable earnings in the future. \* \* \* It is perhaps true that absolute certainty as to the amount of loss or damages in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of the loss is impossible, will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall, with a fair degree of probability, tend to establish a basis for the assessment of damages." Judgment for the plaintiff was affirmed.

In the case at bar the breach complained of occurred





at the time the re-insurance contract between the two companies took effect, namely, July 1, 1915. But, the petitioner White, assuming that his contract was going to be taken over by the Badger Company, proceeded to sell the policies of the Illinois Company, and, as soon as they were prepared, those of the Wisconsin Company, and this continued down to August 1917, when the latter company, having given the petitioner various excuses for their failure to execute an acceptance of his contract, as requested by him, in February 1916, finally informed him that they did not consider his contract in force and would not take it over, whereupon White immediately filed his petition against the receiver of the Illinois Company. In his testimony White stated that the Illinois Company had turned his business over to the Wisconsin Company and given them the knowledge of all his policy holders and agents, and the latter company had gone into the business itself, both as to his agents and his policy holders. This was on cross examination by counsel for appellants. There is nothing in the record to the contrary. Rather, it is corroborated, at least to some extent, one of the officers of the Wisconsin Company testifying that, to the best of his recollection, some policies were sold in the territory in question, through persons other than White.

Following the authorities above referred to, we hold that in the case at bar White was entitled to recover from the receiver such profits as would be reasonably certain of acquisition had the breach complained of not occurred but the contract been fulfilled in its entirety by the Illinois Company, and that such profits may be ascertained by taking the average pro-



fits earned by him during the period of the contract preceding the breach, in the absence of any showing on the part of the receiver that, as our Supreme Court has expressed it, "by depression in trade or other causes" the profits would have been less after the breach than they had been previous to that time. The receiver made no attempt to show that the profits would have been less if the contract had been fulfilled, nor did he advance any reason tending to indicate that such would have been the fact, and in the absence of any such evidence, having ascertained White's average profits for the period preceding the breach, his damages would be made up of those average profits for the period following the breach, less, of course, any profit he may have made in continuing to sell the policies of the companies involved, after the breach and pending his efforts to have the Wisconsin Company take over his contract. The evidence shows that, in fact, he made no profits after the breach. In our opinion, the measure of damages should be as above stated, notwithstanding the fact that it was shown by the evidence that White's business netted him a comparatively large profit in 1912 and also in 1913 and it netted him a very small profit in 1914 and a loss in 1915, the year in which the breach occurred. At best, the future profits can only be approximated and the occasion for estimating the damages being the fault of the one who has breached the contract, damages will not be denied by reason of that fact nor by reason of the fact that the profits earned while the contract was in force show a downward trend from the beginning of the contract period to the time of the breach, but the one who has suffered the damages should be permitted to recover his prospective profits for the period following the breach, measured by his average profits during the period previous to the

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breach unless the party at fault produces evidence tending to show that by reason of certain business or other similar conditions, the future profits would not have equalled the average profits of the period of the contract which had passed, if the contract had been carried out.

The evidence in the case at bar shows that on the business done by the plaintiff during the year 1916, he suffered a substantial loss and that the same was true for the months in 1917, during which he was selling these policies, and the appellants contend that by reason of that fact it should be held that the petitioner had not only suffered no loss but had, in fact, benefited by the breach inasmuch as he was thereby relieved from the obligation of fulfilling a contract which the evidence shows he could not fulfill. That argument is not tenable. Appellants cannot then be permitted to take advantage of their own wrong. The petitioner did not suffer a loss in the conduct of his business until the year 1915, which was the year in which the breach occurred. If the Illinois Company did turn over to the Wisconsin Company the lists of the petitioner's policy holders and if the Wisconsin Company did go into the petitioner's territory and disorganize him both as to his agents and his policy holders, as he testifies they did, and it is not denied, it is not hard to explain why the petitioner suffered a loss in his business during those years. If his loss was occasioned by other reasons, it was incumbent upon the receiver to establish that fact.

It is apparent that if the petitioner had been awarded damages according to the measure we have referred to as the correct one, he would have had a decree for a larger sum



then was fixed by the trial court and therefore the appellants are not in a position to complain of the decree appealed from, by reason of its amount. No cross errors as to this point have been urged or filed by the petitioner.

We find no reversible error in the record and therefore, for the reasons given, the decree of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'BONNEN, J. CONCUR.

There are three of the most important things  
 that we have to do in order to be successful  
 in business. The first is to have a good  
 product. The second is to have a good  
 price. The third is to have a good  
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234 - 25491

ALICE GARRISON O'GRADY,

Appellee,

vs.

HOMER N. MOTSINGER,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 658

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought this action for office rent, alleged to be due from the defendant for the months of August to November inclusive, 1917. The issues were submitted to the court without a jury and a finding was made for the plaintiff and judgment entered in her favor for \$100, from which the defendant has appealed.

The statement of claim declared that the parties entered into a written lease for the period of one year beginning May 1, 1917, at a monthly rental of \$30 and that the defendant entered into possession of the premises and paid rent up to and including July but not thereafter.

The plaintiff testified that the defendant applied for the office sometime in April, 1917, and said he would sign a lease for one year; that she told him she would have the lease drawn up by her nephew and that he could get it from him and he said he would; that she had her nephew prepare the lease in duplicate. She signed the lease and left both copies with her nephew, ready for the defendant to sign. The defendant took possession





of the office on May 1st and moved out late in July.

The plaintiff's nephew testified that he prepared the lease at plaintiff's direction and that she signed both copies; that the defendant looked over the lease and said he would sign it if certain changes were made as he suggested; that these changes were made but that the defendant never signed the lease, both copies of which had since remained in the possession of the witness. A stenographer, who was not at the time of the trial, but had been in the employ of the plaintiff, testified as to the conversation between the parties in April, in which the defendant said he would sign a lease for a year. The defendant denied he had ever agreed to sign a lease for a year but said he had refused to do so and told plaintiff he wanted to rent the office by the month. He also denied that he had made any suggestions about changes in the lease or told plaintiff's nephew he would sign it if such changes were made. The plaintiff was asked what, if anything, the defendant had said as to why he wouldn't sign the lease and she answered, "he was so drunk he couldn't." The evidence showed that after the leases were prepared and signed by the plaintiff, they remained in the plaintiff's offices, one of the rooms of which was the subject of the lease, in the custody of her nephew. It also showed that the amount the defendant paid during the time he occupied the office in question was \$25 per month.

The testimony of the plaintiff and her witnesses, although flatly contradicted by the defendant, was apparently believed by the trial court. On that testimony, we are of the opinion that the court correctly found that the parties had entered into a valid written lease. According to the testimony the defendant agreed to sign a lease for a year and

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when plaintiff said she would have the leases prepared and sign them and leave them with her nephew and that defendant could get them from him, the defendant said he would. The leases were so prepared and left with plaintiff's nephew, which, under the defendant's agreement, was a sufficient delivery. Reynolds v. Greenbaum, 80 Ill. 416. Following this, the defendant actually took possession of the premises covered by the lease and occupied them and paid rent for several months. The lease then became binding on defendant, although he never signed it. Baragiano v. Villani, 117 Ill. App. 372.

The lease was for a term beginning May 1, 1917, and ending April 30, 1919, and was therefore an agreement to be performed within a year and is not within the statute of frauds, as the defendant contends. The fact that the defendant agreed to execute a written lease for a year, some time in April, does not alter the situation. The plaintiff is seeking to hold the defendant on the written lease, - not on his promise to execute it. When the plaintiff had the lease prepared and she signed it and left it with the person, with whom the defendant agreed it might be left, for him (the defendant) to secure and sign, and the defendant took possession, the agreement which became binding on the defendant was the lease and not his agreement to enter into it. In effect, there was a delivery to the defendant and the defendant having gone into possession it became binding upon him though he never signed it.

The defendant's liability is not altered by the fact that he paid \$25 per month during the time he occupied the office although the lease, as prepared, called for \$30 per month. If, as seems to be intimated in the record, the defendant paid only

1. The first part of the paper is devoted to a general discussion of the problem of the existence of a solution of the system of equations (1) for a given set of initial conditions. It is shown that the system of equations (1) has a unique solution for a given set of initial conditions if the functions  $f_i(x, y, z, t)$  are continuous and satisfy the Lipschitz condition with respect to the variables  $x, y, z$ . The existence of a solution is proved by the method of successive approximations.

2. In the second part of the paper, the problem of the stability of the solution of the system of equations (1) is considered. It is shown that the solution of the system of equations (1) is stable with respect to the initial conditions if the functions  $f_i(x, y, z, t)$  are continuous and satisfy the Lipschitz condition with respect to the variables  $x, y, z$ . The stability of the solution is proved by the method of successive approximations.

3. In the third part of the paper, the problem of the asymptotic stability of the solution of the system of equations (1) is considered. It is shown that the solution of the system of equations (1) is asymptotically stable with respect to the initial conditions if the functions  $f_i(x, y, z, t)$  are continuous and satisfy the Lipschitz condition with respect to the variables  $x, y, z$ . The asymptotic stability of the solution is proved by the method of successive approximations.



\$25 per month for the three months he occupied the office, because that was all the money he had, promising to pay the other \$5.00 later, he would still be liable for the monthly rental stipulated in the lease and cannot complain because the judgment is for the smaller amount.

We find no error in the record and therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

Taylor, P. J., and O'Connor, J., concur.



254 - 25512

YELLOW CAB COMPANY,  
a corporation,  
(Plaintiff)

v.

MARTIN L. NILSEN,  
(Defendant) Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,  
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 658

MR. JUSTICE THOMSON delivered the opinion of  
the court.

This is an appeal by the defendant Nilsen, from an order of the Circuit Court, finding him guilty of contempt of that Court by reason of his failure to comply with the terms of a permanent injunction decree theretofore entered, and fining him \$300 therefor. The decree referred to was never appealed from. Previous to the order to show cause, which is involved here, there was another such order, on which the defendant was found guilty and fined \$100, which he paid.

The decree perpetually enjoined the defendant from using the name "Yellow Cab Company", or "yellow cab" or simulation thereof, or a taxicab in dress, finish, style or get-up, identical with or like the taxicabs of the complainant, or any substantial or material part thereof or any simulation thereof. In the petition to show cause, on which the order here appealed from was entered, it was charged that the defendant was operating certain taxicabs in the City of Chicago and that he had caused them to be painted a peculiar pinkish tint which, at night, under electric street lights, made them appear identical or



like the complainant's cabs so that it was practically impossible to distinguish them from those of the complainant and that on several occasions persons had engaged and employed defendant's taxicabs as one for those of the complainant.

On the hearing before the chancellor, complainant's counsel presented a number of affidavits, which supported all the charges set forth in the petition. On this appeal, the defendant has assigned as error, the action of the chancellor in receiving these affidavits in evidence over his objection. The record shows that certain changes were made in three of these affidavits, upon the defendant interposing his objection, and that defendant's objection was then withdrawn. There is sufficient in these affidavits, together with the testimony of several witnesses who testified in open court, to warrant the chancellor in finding that the defendant was in contempt, in failing to comply with the provisions of the permanent injunction decree. The question of whether the other affidavits should or should not have been received therefore becomes immaterial. Assuming that they should not have been received, we must further assume that they were not considered by the chancellor but that he entered the order appealed from on only such competent evidence as was before him. Krelling v. Hartman, 215 Ill. 195.

The defendant further contends, in support of his appeal, that the terms of the injunction decree are uncertain and indefinite and that he should therefore not have been fined for an alleged violation thereof, in the exercise of his judgment. The same question was raised as to a similar decree, in Yellow Cab Company v. Abramoff, Case No. 28665 in





this court, opinion filed October 27, 1919, not yet reported, and for the reasons there given, we hold that the provisions of the decrees were sufficiently definite and certain.

It is quite evident that what the defendant exercised was not his judgment but his ingenuity. He apparently tried to make his cans look enough like those of the complainant, to cause the public to take them for Yellow Cans, and at the same time keep just outside the limits prohibited by the injunction decrees. Compliance with the terms of the decrees calls for the exercise of neither judgment nor ingenuity. If the defendant will fairly apply, a reasonable amount of common sense, he will find no difficulty in the matter. It is a very simple matter to have his cans appear in sufficient contrast to those of the complainant to enable those other than experts to distinguish them. The decrees was not designed to protect experts in colors and designs, but the public, including the careless, the unsuspecting and the "unwary purchaser". Liebig's Extract of Meat Co., Ltd. v. The Chemists' Co-operative Society Ltd., 13 R.P.C. (Reports of British Patent Design and Trade Mark Cases) 638-644; Florence Mfg. Co. v. Fred M. Co., 178 Fed. 73. There are numberless color schemes and designs, open to defendant's use, which will meet that end. An honest effort on his part will encounter no difficulties.

We find no error in the record and therefore the decree of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

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...the ... of ... (1924-1926)  
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...the ... of ... (1930-1932)

...the ... of ... (1932-1934)  
...the ... of ... (1934-1936)  
...the ... of ... (1936-1938)

235 - 25543

FIRST STATE BANK OF PLANO,  
a corporation,

Appellee,

v.

H. J. ISAACH,

Appellant.

SPECIAL TERM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 658

MR. JUSTICE INGERSOLL delivered the opinion of the court.

The plaintiff bank brought this suit on a promissory note, signed by the defendant and drawn to the order of Guaranteed Corn Producers (which we shall refer to as the Company) and by it, endorsed to the bank. It was a demand note for \$270.00 dated March 11, 1912. The issues were presented to a jury resulting in a verdict for the plaintiff. Judgment was entered against the defendant for \$337.45, representing principal and interest due on the note. To reverse that judgment, the defendant has perfected this appeal.

The testimony of witnesses for the plaintiff was to the effect that the Company had purchased a quantity of seed corn from Hughes Brothers, farmers, for which it owed them a balance in the neighborhood of \$2,000; that Hughes Brothers were pressing the company for the payment of that balance and the company did not have funds with which to pay; that the Company had certain stockholders who were also officers of the plaintiff bank; that the company requested the bank to advance or loan Hughes Brothers the \$2,000 and take their note therefor, which the bank did; that the company agreed with Hughes Brothers that it would pay the note when it matured;



## SECTION 1.1

The diagram shows a cross-section of a geological structure.

The diagram shows a cross-section of a geological structure. The top of the diagram is labeled 'Surface'. The bottom of the diagram is labeled 'Base'. The diagram illustrates the relationship between the surface, the fault, and the underlying geological structure. The central vertical line represents a fault or boundary. To the left, a block is labeled 'Block A' and contains a 'Fault'. To the right, a block is labeled 'Block B' and contains a 'Fault'. The diagram shows the fault cutting through the surface and the underlying geological structure.

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that the company was unable to do so and consequently the stockholders of the company were requested to advance cash or give their notes to the extent of 10 per cent of the amount of stock they held, to the company, for the purpose of liquidating the Hughes Brothers note; that all the stockholders complied with that request, including the defendant issues; that these notes were turned over to the bank in liquidation of the Hughes Brothers note and that all of them had been paid, except the one here sued upon although demand for payment had been made upon defendant a number of times. When the defendant gave the company his note, he received in return, the company's note, payable on demand for the same amount, \$270.

The testimony of the defendant was to the effect that on the occasion of his giving the company the note sued upon, W. D. Stewart, who was then the president of the bank and also an officer of the company, told him that the company was overdrawn at the bank; that he expected the bank would be examined shortly and it would not look well to have the examiner find that the bank was carrying an overdraft of a corporation of which he and his brother, who held a controlling interest in the bank, were executive officers; that the company had enough seed corn on hand to cover the overdraft; that he wanted the defendant and the other stockholders (who had agreed to the plan) to give their notes to the bank; that he would then go ahead and sell the corn, pay the notes and return them to their makers; that he said the defendant would never be called upon to pay the note; that, in the meantime the defendant could have the company's note; whereupon the defendant gave Stewart the note sued upon and received the company's note,

In support of this appeal, the defendant first con-



tends that the verdict and judgment for the plaintiff are against the manifest weight of the evidence. Citing People v. Glass, 61 Ill. 94, the defendant argues that inasmuch as the court is presented with the testimony of two witnesses, (V.O. Stewart and the defendant M. J. Isaacs) neither corroborated, both interested in the result of the suit, and who are in direct conflict with each other, the plaintiff failed to meet its burden of proof and it was therefore incumbent on the court to grant his motion for a directed verdict, at the close of all the evidence, or, not having done so, and a verdict for the plaintiff having been returned by the jury, the court should have set the verdict aside and granted a new trial.

In the first place, we do not consider that the case cited is authority for such a rule as the defendant attempts to invoke, nor is it the law of this state. We adhere to the ruling of this court as announced in Hately v. Eiser, 102 Ill. App. 542, as follows:

"People v. Glass, 61 Ill. 94, and cases in this court in which language from that case has been quoted are cited to us, as they often are in support of the position that where plaintiff and defendant directly contradicted each other without corroboration on either side on the essential basis of a case, there can be no preponderance of evidence sufficient to justify a verdict for the plaintiff, which should consequently be set aside. Whatever may have been at any time said in opinions of this court applied to the facts of the particular case, it is clear that neither the decision in People v. Glass, nor even the dictum of the learned judge who wrote the opinion, is ground for the declaration of any such universal rule. We still hold, as Judge Hallister said in Herring v. Perkins, 6 Ill. App. 808: 'It will not do to say as a matter of law that there can be no preponderance of the evidence in favor of the party holding the affirmative when there are but two (opposed) witnesses upon the facts in issue.'"

Even where the testimony of the plaintiff is without corroboration and that of the defendant is corroborated by





other unimpeached witnesses, it does not necessarily follow that a verdict and judgment for the plaintiff will be set aside by a reviewing court as being against the confident weight of the evidence. Van Meter v. Lambart, 104 Ill. App. 243. As was said in West Chicago R. R. Co. v. Liewersing, 197 Ill. 407, "Even were the plaintiff contradicted by the defendant and another witness, the judgment would not be reversed if there were elements of probability to turn the scale."

But, in the second place, this is not a case where there are two witnesses flatly contradicting each other and neither of them without corroboration. Although the testimony of the defendant is not corroborated by that of other witnesses, the testimony of W. D. Stewart, for the plaintiff, is corroborated in a number of particulars by the testimony of other witnesses for the plaintiff. It is true, as the defendant contends, that in a number of respects his testimony and that of W. D. Stewart is flatly contradictory. But he is so flatly contradicted in other respects by G. M. B. Stewart and Mr. Lord, who, in some matters, give testimony which tends to corroborate the testimony of W. D. Stewart. Mr. Lord, then president of the bank, testified that when he called on the defendant and requested payment of the note the defendant said he could not take care of it just then as he had bought an apartment building and was short of ready money but that he would see that it was taken care of. Mr. Lord further testified positively that the defendant did not show him the company's note he held, at that time, and that he had no recollection of anything being said to the effect that the only reason defendant did not pay his note was because he had an agreement with W. D. Stewart to the effect





that defendant would never be called upon to pay it, and that if such a statement had been made he would remember it. The defendant testified that he did make that statement to Dr. Lord and that he did show the company's note held by him and that Dr. Lord said he had never known about that note and he would ask the Stewart boys about it. The defendant also testified that Dr. Lord's statement to the effect that, upon the latter presenting the note in suit, for payment, the defendant said he could not take care of it then as he was short of cash but would do so later, was "unqualifiedly untrue". W. B. Stewart testified to a demand he made on the defendant for the payment of this note, on which occasion the defendant gave a reply similar to the one Dr. Lord testified he made upon the occasion of the demand made by him. The defendant denied that W. B. Stewart had ever demanded payment of him on the note. There were also contradictions in the testimony of the defendant and of the witnesses for the plaintiff with reference to meetings of the stockholders of the company attended by the defendant. W. B. Stewart testified to demands he had made on defendant to pay the note. The defendant testified, "Deering (W. B. Stewart) has never asked me, nor have any of the Stewart boys, to pay this note." There were several references made to the Stewarts by the defendant in his testimony, which would hardly have the effect of causing the jury to discredit these witnesses for the plaintiff. The defendant testified that he knew the Stewart boys very well, - "we have been, and now are, on friendly, intimate and cordial terms." Again he testified that his relations with W. B. Stewart were very cordial and that whenever the latter came to town he came to see him and visit with him and that the last time he talked with Deering Stewart about the company's affairs, the latter stated he would get



up a statement; that that was a long time ago but it satisfied him that some time Stewart would furnish such a statement. "As I believed him then and do now"; that such a statement had never been furnished, "but if anything ever develops I know the Stewart boys will make an accounting, of that I have no doubt."

It is not without reason that the plaintiff contends that if the giving of the defendant's note was solely for the accommodation of the bank, and he was never to be called upon to pay it, as defendant contends, (1) that it should be drawn to the company's order and, as defendant admits, that his conversation with W. D. Stewart should include the talk of the company's assets and its ability to take care of the obligation; (2) that the defendant should strike out the confession of judgment clause in his note, as he did; (3) that all the stockholders should be included in the plan, in proportion to their stockholdings, as the note of any one of them would have done as well and caused much less trouble; (4) that the company should give its note to the defendant for the same amount as the note given by the defendant; (5) that three persons, representing the bank should call upon the defendant at different times and request him to pay his note. All of these circumstances, with the testimony of the plaintiff's witnesses as to the making of this note by the defendant and its delivery to W. D. Stewart for the company and its accommodation, and not for the accommodation of the bank, and the testimony of the defendant to the contrary, were all presented to the jury, and have been determined by them adversely to the defendant's contentions. In our opinion the state of this record is such that we would not be justified in disturbing the verdict of the jury as confirmed by the trial court.





We are not unmindful of the fact that the defendant is a reputable member of the bar of Cook county and for some years has been a Master in Chancery of the Superior Court of that county, and that he is one in whose integrity we have every confidence. But that fact cannot change the rule of law involved. The defendant and the witnesses for the plaintiff testified concerning matters that had occurred some years before. The jury decided that the defendant was mistaken in his version of what actually took place and we are unable to say that the verdict and judgment are not supported by the manifest weight of the evidence.

The defendant next contends that the burden rested on the plaintiff to show that it was the holder of defendant's note in due course. But under sec. 58 of our Negotiable Instruments Act, the plaintiff would be presumed to be a holder in due course, unless and until it was shown that the instrument was defective. Farr v. W. F. Dallas & Co., 214 Ill. App. 468. The plaintiff admits that when it took the note it had knowledge of its nature. The defendant set up as a defense, the alleged defect in the note, in the hands of the plaintiff. This was an affirmative defense on which the burden of proof was on the defendant. Of that there can be no doubt. Finley v. Hoynton, 70 Ill. 381; Downing v. Gruenewald, 143 Ill. App. 208. The defendant must be held to have failed to show by a preponderance of the evidence that the title of the plaintiff in the note, was defective. Having failed to meet his burden of proof in that regard, the presumption that the plaintiff was the holder in due course, was not overcome.

The defendant also contends that the trial court erred in the admission of certain evidence. One of the



Stewart testified that in one of his talks with the defendant about the payment of his note he reminded him that similar notes had been given by the stockholders and that he was the only one who had postponed payment and that defendant said that he could not take care of his note then but would do so later but that defendant said nothing to the effect that a promise or agreement had been made that he would not be called upon to pay his note. We are of the opinion that there was no error in admitting this testimony. If the defendant's note was given as part of a plan involving the giving of notes by all the stockholders, the fact that all the others had been paid and that defendant had been advised to that effect, at which time he had given no reason for not paying his note, except lack of funds, was competent, as tending to rebutt defendant's claim that it had been agreed he was never to be called upon to pay his note. In any event, the admission of this evidence could not be availed of by the defendant, even if it was error, as testimony to the same effect was given by another witness, as to which defendant interposed no objection. Johnson v. Downing, 188 Ill. App. 836; Krauer v. The Thomas E. Jeffery Company, 191 Ill. App. 598.

It is also contended that the court erred in admitting certain copies of letters which the plaintiff claimed to have sent the defendant but which the latter said he had never received, as they were demands for payment and merely self-serving declarations. The error in the admission of these copies, if any, was inconsequential and harmless as there was competent evidence of a number of demands for payment, made of the defendant, other than these letters and any further statements the letters contained were also covered by other testi-



mony in the case. The defendant's final contention that his claim for set-off entitled him to judgment against the plaintiff is without support by reason of the fact that he makes no claim for set-off in his affidavit of merits.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.





294 - 25552

DAISY M. ROTHWELL, formerly  
Daisy M. Hart,

Appellant,

vs.

JOHN L. TAYLOR, individually  
and as executor of the estate  
of ELIZABETH CONDELL, deceased,  
Appellee.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 658

MR. JUSTICE THOMSON DELIVERED THE OPINION OF THE COURT.

The plaintiff brought this action of replevin against the defendant individually and as executor, to recover possession of two notes and two certificates of deposit which she claimed had been given to her by the deceased during her lifetime. The action was later changed to trover. The issues were tried by the court without a jury, resulting in a finding and judgment for the defendant, to reverse which, the plaintiff has perfected this appeal.

Elizabeth Condell was somewhat advanced in age and was in ill health, and during the last month or two of her life was cared for by the plaintiff, who was her niece. Among other property she possessed the notes and certificates in question. One note was for \$1300, in which the plaintiff's father and brother were the makers and the other was for \$300, in which the plaintiff's sister and her husband were the makers. Both notes were drawn to the order of the deceased and were never indorsed by her. The certificates of deposit, one for \$465 and the other for \$100, were likewise never indorsed by the deceased.

About July 1, 1917, the deceased, who resided at Libertyville, Illinois, sent for Mr. Benjamin Miller, a lawyer,



The first part of the report deals with the general conditions of the country, and the second part with the details of the survey. The first part is divided into two sections, the first of which deals with the general conditions of the country, and the second with the details of the survey. The second part is divided into two sections, the first of which deals with the details of the survey, and the second with the results of the survey.

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and requested him to prepare her will providing for the payment of her debts and funeral expenses and the erection of a monument in the cemetery lot, and leaving the balance of her estate for the purpose of establishing and maintaining a hospital. He prepared the will accordingly and it was duly executed. The plaintiff came to care for her aunt about this time and about a month later the plaintiff called upon Miller at his office and said her aunt wished him to come and see her. When Miller saw Miss Condell at her home she told him she wished him to change her will as she wished to leave her house and lot to her niece, the plaintiff, for her services in caring for her in her illness, and that she wished her will to remain as it then was in all other respects. Miller accordingly prepared another will, leaving the house and lot, valued at about \$4,000, to the plaintiff, and except for that change the last will was identical with the first one. This was the will which was probated. At the time this will was executed Miller talked with Miss Condell and he says she specifically stated at that time that she wanted the house and lot to go to the plaintiff for her services and she wanted the two notes and the two certificates of deposit, together with other property she mentioned to go to the hospital fund. Miller then asked her where she kept these papers and she designated a bureau drawer. He asked her if she thought that was a safe place for them and she told him to take an \$18,000 mortgage which was there and place it in his vault with the will, but to leave the two notes and the two certificates of deposit because "I might be sick and I might need the money that is in the bank. I want to realize from those notes and I can get money from Mr. Hart if I need it and I can draw that money out of the bank there." A few weeks later Miss Condell died and at that time the notes and certificates





in question were in the plaintiff's possession and she claimed that her aunt had given them to her. The defendant claimed that they belonged to the estate and he demanded that the plaintiff deliver them to him as executor, threatening to apply for a citation against her in case she did not do so. The plaintiff finally put them in the hands of a lawyer instructing him not to turn<sup>them</sup> over to defendant without an order of court. Later the lawyer did deliver them to the defendant without any order having been entered by the court, taking the defendant's receipt for them in which it was provided that the notes and certificates were delivered without prejudice to any rights the complainant might have. Later the notes and certificates were duly inventoried by the executor, the inventory setting forth that none of them was indorsed by the deceased, "by reason whereof title to the same remained in said Elizabeth Condell and the undersigned, as executor of her will, claims the same as property of her estate. Said notes and certificates were in the possession of said Daisy Hart at the time of the death of said Elizabeth Condell, but were turned over by her to the undersigned, as executor, on demand, under protest." The defendant indorsed the certificates of deposit and deposited them in his bank account as executor, and he later started suit on the two notes against their respective makers. After demand made on the defendant in the plaintiff's behalf, for the return of the notes and certificates to her, she started this action.

In support of her appeal, the plaintiff contends that the only question involved is whether title to negotiable paper can pass by delivery without endorsement. Rather, the question is whether, under all the facts shown by the evidence, the title to the notes and certificates in question, did pass to the plaintiff, though without the endorsement of the deceased. Defendant



does not contend that title could not pass without that endorsement, but that the evidence shows that it did not. The question is - did the plaintiff come into possession of the notes and certificates by virtue of a gift of the paper to her by the deceased - or did she not? The trial court found she did not.

The plaintiff contends that the trial court admitted improper evidence on which the judgment appealed from was based. The plaintiff cannot complain of the testimony of the witness, Mrs. Fry, for her motion to strike out that testimony was allowed, the court saying, "What she testified to, I will strike out." Plaintiff objected to the testimony of the witness Miller because he was attorney for the estate of Elizabeth Condell and a trustee and director, under the will, of the hospital fund with certain fees therein fixed for his services. In our opinion, Miller was a competent witness. He did not come within the provisions of sec. 2 of the Evidence Act, as the plaintiff contends.

It is the opinion of the majority of the court, that under the authority of Martin v. Martin, 174 Ill., 371, it having been shown that the plaintiff had possession of the securities in question previous to and at the time of the death of her aunt, such possession of the securities, though unendorsed, must be considered as prima facie evidence of her ownership of them, and therefore the defendant had no right to dispossess her and now has no right to retain the securities without over-coming that presumption by contrary proof. We do not consider that the cases to which the defendant has called our attention, in contending the contrary, are in point. In Shea v. Doyle, 65 Ill. App., 471, citing Barnum v. Reid, 136 Ill., 388, it appears that the one claiming ownership of an unendorsed note, as against the estate

It is the mission of the Department of the Interior to protect the public lands and to manage them for the benefit of the people. The Department is responsible for the conservation of the natural resources of the United States and for the development of the public lands. The Department is also responsible for the management of the public lands and for the protection of the public interest in the public lands. The Department is also responsible for the management of the public lands and for the protection of the public interest in the public lands.



of the deceased payee, was given possession of it for the purpose of collection. In that case it was held that "the mere unexplained possession" of the note by the claimant was insufficient to rebut the presumption of ownership in the estate. In holding that the presumption of ownership is in the estate, the court in that case followed the Barnum case. But in that case the one claiming ownership of the securities in question, as against the decedent's estate, never had possession of them. The defendant has also called our attention to Millard v. Millard, 221 Ill., 93. In that case, it was also shown that the one who was claiming the securities in dispute, as against the estate, never had exclusive possession of them, but that, on the contrary, the deceased had retained possession of them and had done a number of things on the basis of his exclusive ownership of the securities subsequent to the time the claimant contended there had been a gift to her.

In the opinion of the majority of the court the presumption of ownership of these notes and certificates in the plaintiff was not overcome by the evidence submitted in behalf of the defendant. The only evidence that might be considered as tending to overcome that presumption, was the evidence of Miller to the effect that the deceased had told him, at the time of the execution of the last will, that she wanted these securities to go to the hospital fund. But this evidence could not be considered sufficient to overcome the presumption of ownership in the plaintiff, it having been established that the securities had come into her possession before her aunt died. The remark of the deceased, testified to by Miller, was made some three or four weeks prior to her death. It may well be that during that period she concluded to give these notes and certificates to her niece, the plaintiff. That her intention to have these securities





go into the hospital fund was not very definitely fixed, even at the time she made the remark testified to by Miller, is shown by the fact that in the same conversation Miller says that the deceased told him to take an \$18,000 mortgage and place it in his vault for safe-keeping, but to leave the notes and certificates in her bureau drawer, as she might want to realize on them. It should further be noted that the witness Miller, who was called by the defendant, testified in his direct examination, in answer to questions put to him by counsel for the defendant, that before the will was admitted to probate the plaintiff had told him that these certificates had been given to her by her aunt and asked whether it was necessary to have them appear in the estate. The defendant, having brought out that testimony, is not in a position to complain of it and it furnishes some evidence to explain the plaintiff's possession of these papers at the time of her aunt's death.

The contentions of the defendant in the case at bar might be tenable if it were shown that the plaintiff did not have possession of these papers until after the death of her aunt. It is clearly shown, however, that the plaintiff had complete possession of the papers some days before her aunt died, for her sister testified that some time during the week previous to her aunt's death, the plaintiff turned the papers over to her and that she, in turn, gave them to her father for safe-keeping.

For the reasons stated, the judgment of the Municipal Court is reversed and judgment will be entered in this court in favor of the plaintiff for \$2,165.

JUDGMENT REVERSED AND JUDGMENT HERE.

Taylor, P. J., and O'Connor, J., concur.



303 - 28861

BRISKE BAKING COMPANY,  
a corporation,

Appellee,

v.

SCHELEN BAKING COMPANY,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I. A. 659

MR. JUSTICE THOMSON delivered the opinion of  
the court.

This is an appeal by the defendant from a judgment in the sum of \$340.00 obtained in the Municipal Court of Chicago, by the plaintiff, in an action alleging damage to the plaintiff's automobile truck, occasioned by the negligence of certain of the defendant's employees in the operation of one of its automobiles.

A three quarter ton truck, loaded with about 400 pounds of bread, belonging to the plaintiff company, was being driven by one of its employees in an easterly direction and along the right hand or south side of 57th street in the City of Chicago. At the intersection of that street with State street the employee brought the truck to a stop to permit the passing of a street car along State street and he then proceeded eastward. The next intersecting street was Hubbard avenue and when the front of the plaintiff's truck had reached a point just east of the middle line of Hubbard avenue, a seven passenger touring car, belonging to the defendant and containing a large basket or box of bread, which was being





taken to a certain train at a railroad station in Englewood, in the City of Chicago, suddenly crossed in front of the truck, from the north to the south, and the front springs of the truck and the rear, right-hand wheel of the touring car came together. As a result of the collision the truck was swung entirely around and landed at the southeast corner of Wabash avenue and 57th street, apparently turned over on its side and landed, finally, in a westerly direction and the touring car, apparently on three wheels and the hub of the fourth, continued on Wabash in a southerly direction and stopped near the east curb at a distance south of 57th street, fixed as 70 feet by the driver of the plaintiff's truck and the president of the plaintiff company, who reached the scene of the accident a short time after it occurred, and at 25 feet by a witness for the defendant, who also reached the scene of the accident a short time after it occurred.

The driver of the plaintiff's truck testified that the accident happened on January 3, 1916, at about 6:15 A.M.; that the morning was not very cold and was not frosty and that the streets were dry. He also testified that although it was before sunrise it was not a dark morning and that the intersection was well lighted by an electric arc lamp. He further testified that he heard no sound or warning of the approach of the defendant's touring car and that he did not see it "before it tried to turn;" that his car was proceeding across Wabash avenue at a rate of about eight miles an hour; and that at the time of the collision he was on the right hand side of 57th street and the front of his truck was across the middle line of Wabash avenue; that he noticed three men in the defendant's car as it passed and after the collision he climbed out of his truck and then saw three young fellows approaching



from the other car, who told him they were from the Schulze Baking Company and that they were going to deliver bread at the depot. He also testified that he saw no lights burning on the defendant's car until after the collision when he noticed "a regular lantern, a switchman's lantern, a barn lantern, hanging on the left hand side of the leaving car." Upon being questioned as to the lights on the defendant's car, on cross-examination, this witness answered, "I didn't see any. I generally look around on the street before crossing, probably looked out for him, and if I had seen him, this probably would not have happened." In describing this occurrence the witness testified further that "The Schulze right hand wheel caught my corner and front springs \* \* \* He tried to get by but he hit me". It appears that there were curtains or doors in the front part of the plaintiff's truck, around the space occupied by the chauffeur, and that these curtains were up or pulled back on the left hand side of the truck.

The plaintiff's chauffeur was the only occurrence witness. It appears from the record that the chauffeur who was driving the defendant's car was absent in the service at the time of the trial of this case. There is no reference made in the testimony submitted in behalf of the defendant to the other occupants of the car, referred to by the plaintiff's chauffeur in his testimony.

In support of this appeal the defendant contends that the trial court erred in refusing to direct a verdict and instruct the jury to find the defendant not guilty. This contention is not tenable. On the evidence, the substance of which we have above outlined, it is entirely clear that the



matter of the defendant's negligence and also the matter of due care on the part of the plaintiff, were questions for the determination of the jury and the trial court did not err in overruling the defendant's motion for a directed verdict.

Counsel for the defendant does not contend in his argument that the verdict is against the manifest weight of the evidence. The only other point presented in support of the appeal is the defendant's contention that the court erred in admitting certain testimony, which was alleged to have been incompetent. It would serve to no purpose to discuss this testimony in detail. We have examined it all carefully and in our opinion there was no error committed in this connection.

The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.





341 - 25601

BROWN COAL COMPANY,  
a corporation.

Appellant.

v.

CARTERVILLE WASHED COAL  
COMPANY, a corporation.

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 659

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Brown Coal Company, brought this action to recover damages for the alleged failure of the defendant, Carterville Washed Coal Company, to make deliveries of coal in compliance with the contract entered into by the parties. The defendant filed a plea of set-off, based on a quantum valebat, for the value of certain deliveries which had been made by it but for which the plaintiff had not paid. At the close of the plaintiff's evidence, the court directed a verdict for the defendant for the amount of its set-off, \$557.74 and judgment was entered accordingly, to reverse which, the plaintiff has perfected this appeal.

There was no dispute about the facts involved. The plaintiff was an Iowa corporation with its principal place of business at Sioux City, Iowa. The defendant was an Illinois corporation, with its principal place of business at Chicago, Illinois. In April, 1916, the parties entered into a written contract whereby the defendant sold the plaintiff 600 cars of a specified grade of coal to be delivered to the plaintiff



The following table shows the values of  $X$  and  $Y$  for the line  $Y = -X + 10$ .

TABLE I

| $X$ | $Y$ |
|-----|-----|
| 0   | 10  |
| 1   | 9   |
| 2   | 8   |
| 3   | 7   |
| 4   | 6   |
| 5   | 5   |
| 6   | 4   |
| 7   | 3   |
| 8   | 2   |
| 9   | 1   |
| 10  | 0   |

The line  $Y = -X + 10$  is a straight line with a negative slope. It intersects the y-axis at the point (0, 10) and the x-axis at the point (10, 0). The line is a straight line with a negative slope, and it is a straight line with a negative slope.

at points and by routes specified by the latter at a stipulated price f.o.b. Hazard, Kentucky, the point of mining. While the shipments were to be made as ordered by the plaintiff, the contract specified the approximate number of cars to be taken each month during the contract period, which was to expire March 31, 1917. The contract provided that payments were to be made on the 15th of each month for all coal shipped during the preceding month. It also provided that "in case of \* \* \* unavoidable delay in shipment, inadequate car supply or other contingencies beyond the seller's control, deliveries of the articles hereby contracted for, may be partially or wholly suspended \* \* \* during the continuance of such interruptions; such suspensions, however, shall not in anywise invalidate this contract or any part thereof, but on resumption of the work, the shipments shall be continued at the specified rate until the full amount contracted for shall be delivered."

Up to October 1, 1916, the plaintiff had ordered the shipment of 250 cars of coal under this contract but the defendant had shipped only 71 cars and was in default as to the balance. On October 16, the parties met and agreed that "they would consider it as though there were but 50 cars of coal due and undelivered" up to October 1, and they further agreed that the amount of coal called for by the contract for the remainder of the period, would be considered as reduced by 50 per cent. The plaintiff gave the defendant shipping orders for a total of 34 cars during October, November and December but the shipments made by the defendant on these orders during the months named, aggregated only 10 cars. The plaintiff paid the defendant for all coal shipped up to Oct-





ober 1, but not in compliance with the terms of the contract, for in most instances payments were made after the 15th of the month. The plaintiff never paid the defendant for the coal shipped during the months of October, November and December, and it was stipulated that if anything was due the defendant by way of setoff, it was \$557.74, the amount of the judgment recovered by the defendant.

It was agreed by the parties on the trial that on and after October 23, there was an acute car shortage and that certain embargoes were placed by the railroads on the movement of equipment and that by reason of those conditions "the defendant may be deemed to be excused for having failed to deliver on that account, all except 64 cars of coal, and the parties hereto stipulate that there still remains undelivered a total of 64 cars of coal." The parties also stipulated as to the average difference between the contract price and the market price "of said 64 cars of coal". After December, 1916, the plaintiff sent the defendant communications urging further deliveries and the defendant made requests for payment for the coal previously shipped but not paid for. The defendant did not refuse to make further shipments but wrote to plaintiff on several occasions explaining the conditions that were interfering with shipments. Defendant seems to have shipped two cars on one occasion but they were never received. The contract period expired without any further coal being received by the plaintiff and ultimately this action grew out of the controversy between the parties over the subject-matter of their contract.

It was the position of the defendant in the trial court, that in order to make out a prima facie case, in its suit against the defendant for the alleged breach of this



contract it was necessary for the plaintiff to show that it was not in default under the contract and that the plaintiff failed to make out such a prima facie case but on the contrary the plaintiff's own evidence showed that it was in default itself, by reason of its failure to pay for coal which had been delivered and therefore, the defendant was entitled to a peremptory instruction, and as there was no dispute over the amount and value of the coal delivered and not paid for, the defendant was entitled also to a judgment in its favor on its claim for setoff. Apparently the court adopted that view of the case.

In the case of a contract such as the one involved here, it is the general rule that the buyer cannot treat the contract as in force so far as its right to demand delivery of the goods is concerned but not in force, so far as the seller's right to demand payment for the goods delivered, is concerned. If the buyer treats the contract as in force, and brings an action for damages against the seller for the latter's breach, he must show performance of the contract on his own part or a legal excuse for non-performance. In order to do this it would be incumbent upon the buyer, in making out his prima facie case, to show payment for the goods delivered or an offer to pay or to set off payment against the damages claimed, and at the time specified in the contract for payment. Harber Brothers Co. v. Moffat Cycle Co., 161 Ill. 94; Chicago Washed Coal Co. v. Whitsett, 201 Ill. App. 494, 178 Ill. 623; George M. Neas Co. v. Dawson, 140 Ill. 136; Covington v. Pink, 63 Ill. App. 527; Neaves Fully Co. v. Jewell Belting Co., 102 Ill. App. 375; North Shore Lumber Co. v. South Side Lumber Co., 178 Ill. App. 96; Cartersville Mining Co. v. Eldridge, 199 Ill. App. 534; Buxton v. Bliss & Laughlin, 210 Ill. App. 247; Briggs





Turivas Furnace Co. v. Erie Iron & Steel Co., 213 Ill. App. 635; Cicero & Provise Ice Co. v. Natoma Dairy Co., 214 Ill. App. 636.

But the plaintiff contends that, in such a situation, the seller, by his conduct, may waive the buyer's breach in failing to pay for the goods delivered, in the manner specified by the contract, and in that event the seller may not interpose the buyer's breach in failing to pay, so as to defeat the buyer's right to recover damages for the seller's breach in failing to deliver the goods as called for by the contract. In other words, the plaintiff's position is that where, by his conduct, the seller has waived compliance with the terms of the contract by the buyer as to payment, the latter may maintain an action on the contract, for damages caused by the seller's breach in failing to deliver, without showing, as a condition precedent to his right to recover, or as a part of his prima facie case, that he himself has complied with all the terms of the contract as to payment. The question of a waiver was raised in Buxton v. Blinn & Laughlin, supra, but in that case the seller cancelled the contract by reason of the buyer's failure to make payments as agreed. The question was whether the seller had waived his right to cancel the contract and the court held that the evidence failed to establish any conduct by the seller showing such a waiver. The court referred to the case of Glen Hilde Coal Co. v. Marion County Coal Co., 213 Ill. App. 264. In that case the buyer had continually been in arrears as to payments under the terms of the contract but notwithstanding that fact the seller had continued to make deliveries for a time but finally, because of the buyer's continued breach of the contract in the matter





of payment, the seller cancelled the contract and the question presented to the court was whether the seller was justified in so doing. The court said, among other things, that it could not be successfully contended that, by continuing the contract in force, the defendant had waived all past breaches, adding, "The evidence shows that these alleged waivers were conditioned upon the future fulfillment of its contract by the Glen Ridge Company, and it having failed therein, the breach was revived."

One of the cases relied upon by the defendant to sustain the judgment appealed from is Cartersville Mining Co. v. Eldridge, 199 Ill. App. 534. The facts involved in that case were very similar to those involved in the case at bar. In the case cited, the seller brought an action against the buyer, on the common counts, to recover for certain deliveries made to the buyer which had not been paid for by the latter and the buyer pleaded a setoff, claiming damages for an alleged breach of contract by the seller to furnish the buyer coal in compliance with the terms of the contract. The principal question before the court was whether the buyer was entitled to a setoff, the balance due the seller for coal delivered but not paid for, not being disputed. The contract called for one car of coal per day, of a specified grade and at a specified price, from the date of the contract to April 1, 1906, payments to be made on the 15th of the month for all coal shipped the preceding month. The testimony disclosed (as in the case at bar) that neither party repudiated the contract and both were in default during almost the entire life thereof. The seller in no month furnished the quantity of coal called for, and the defendant at no time paid for the coal it received, when pay-



ment was due. The theory of the buyer as to his right to recover under the plea of setoff was that he had sustained loss and damage by reason of the seller's failure to deliver coal as provided by the contract, necessitating its purchase in the open market at a price in advance of the contract price. This court, citing Harber Brothers Co. v. Moffatt Cycle Co., 151 Ill. 84 and Bradley v. King, 44 Ill. 329, held that in order to entitle the buyer to recover on his plea of setoff, it was incumbent upon him to show performance of his part of the contract or what would excuse performance and that he had shown neither, the evidence showing that he was clearly in default in his failure to make payments as provided for in the contract. Quoting from the cases referred to, the court said that "Where a buyer has accepted goods delivered under an express contract, but not at the time nor in the quantity required by it, with knowledge of the default of the seller in those respects, and has himself failed, without legal excuse, to pay for them according to it, he cannot maintain an action on the contract for such default of the seller." We have examined the abstract of record and the briefs filed in this court in that case and find that the question of whether the seller's conduct was such that it had waived the buyer's breach and therefore was not in a position to insist that the buyer had failed to make out a prima facie case because he had not shown that he had himself performed under the contract or shown a legal excuse for his failure to perform, was not raised in any way.

In the case of Finch & Company v. New Ohio Washed Coal Co. 156 Ill. app. 529, the buyer brought an action against the





seller for damages caused by an alleged breach of a contract by the terms of which the defendant was to sell and the plaintiff was to buy 20,000 tons of coal of a specified kind in "about equal monthly installments during the year commencing April 1, 1905 and ending March 31, 1906" for which the buyer was to pay by remitting on or before the 25th of each month. The defendant seller pleaded the general issue and a setoff. The evidence showed that the defendant sold its mine in December, 1905 and thereafter was unable to make deliveries as called for by the contract. The plaintiff failed to pay for October shipments on November 25. Under date of December 12, the defendant wrote the plaintiff repudiating the contract on the ground of the plaintiff's failure to make payment as called for under the terms of the contract. The court held that this was an after-thought and that the real reason for the repudiation of the contract by the defendant, was the sale of its mine. There was a dispute between the parties as to whether or not there had been an express extension of the payment due November 25, and on that issue the jury decided against the contention of the plaintiff. But the evidence showed that in previous months the plaintiff had made his payments after the dates specified in the contract and the defendant had accepted them without complaint and had proceeded to make further shipments to the plaintiff under the contract and the court held that such conduct amounted to a waiver "not of the right to demand payment promptly, but of the right to repudiate, without notice or any demand, all further obligations, because of a failure to pay on the 25th of the month,- a waiver, in other words, of the right to require this strict performance as a strict condition precedent to the fulfillment of defendant's obligations."



The court held that the defendant, having impliedly waived strict performance, could not treat plaintiff's nonpayment on November 25th as working, ipso facto, a forfeiture of plaintiff's right, to compel further performance. The court pointed out that the defendant had filled certain of plaintiff's orders without requiring the payment called for by the terms of the contract, on November 25, and after that date, it accepted additional orders without objection, and said, "by all these acts, it waived any prior default by plaintiff as a condition precedent; it could no longer repudiate on this ground".

The plaintiff in the case at bar strongly contends that on the principles of law announced in the foregoing case, and others of a similar import, it should be held that, inasmuch as the evidence before us shows that, notwithstanding its failure to make the payments called for by the contract here involved, in November, December and January, the defendant accepted its orders without complaint and made certain further shipments and attempted to make others, the defendant thereby waived plaintiff's failure to fulfill the terms of the contract and therefore the plaintiff may make out a prima facie case in its suit for damages on the contract, occasioned by defendant's breach in failing to make deliveries, without showing that it had fulfilled the requirements of the contract. In our opinion that contention is untenable. The conduct of the defendant, referred to, may have been such that it lost the right to repudiate or cancel the contract, without notice that it would do so if payment were not made, but that fact has nothing to do with the burden which the law has placed on the plaintiff, in making out its case, where it sues for damages





caused by an alleged breach of the contract. The defendant in the case at bar is not seeking to exercise the right to cancel the contract. Both parties treated the contract as in force throughout its period. That being the situation, neither party could bring an action against the other on the contract and recover damages for an alleged breach, without showing, as a part of its prima facie case, that it had itself substantially complied with all the terms of the contract and no conduct of such other party, amounting to a waiver of its right to cancel the contract, could affect that burden which the law places on a party suing for a breach of a contract or do away with any of the necessary elements of his prima facie case. Urging the contrary rule, the plaintiff has also called our attention to Hibernian Banking Association v. Eckhart & Swan Milling Co., 140 Ill. App. 479, which also involved a coal contract, where the court held that under all the circumstances there shown, the defendant (buyer) was justified both in purchasing coal in the open market when the plaintiff failed to make the deliveries called for by their contract and in withholding payment for the coal already received while it remained doubtful whether the plaintiff would furnish the coal called for by the contract. In other words, the court held, in effect, that although the party seeking damages for an alleged breach, had itself not complied with the terms of the contract, it proved a legal excuse for not doing so. The contract involved in that case called for screenings and when it became impossible to furnish that the plaintiff delivered some mine run coal and there was a dispute as to the price which the plaintiff was entitled to demand for that grade of coal.

In our opinion, the rule as we have stated it above,





is well settled in this State and in order to make out a prima facie case in an action on the contract, seeking damages for an alleged breach, the plaintiff, if he is the buyer, must allege and prove that he has himself performed all the terms of the contract, as to payment or such facts as would constitute a legal excuse for his failure to perform. He may establish performance by showing that either he has made or offered to make, all the payments required by the contract and in the manner therein specified or that, on or before the dates of such payments, he has offered to set them off against his claim for damages caused by the alleged failure of the defendant to comply with the terms of the contract, which would be equivalent to a tender of the money due. Finch & Co. v. New Ohio Washed Coal Co., 156 Ill. App. 589. Such an offer was made in the case cited but in the case at bar the plaintiff neither made nor offered to make the payments called for by the contract nor offered to set them off. No claim is made in the case at bar that the plaintiff was excused from performance in the way of making the payments called for by the contract.

But the plaintiff contends that even on this theory of the case, it was entitled to damages, at least for the defendant's failure to deliver the 80 cars which it was agreed was the extent of defendant's default on October 1, and that its right to such damages cannot be taken away by reason of its subsequent failures to make the payments due under the contract in November, December and January. The plaintiff is not in a position to urge that contention here, inasmuch as a careful examination of the record shows that no such theory was advanced and no such contention was made by the plaintiff in the trial



of this case in the Superior Court.

The plaintiff's contention concerning the applicability of the laws of Iowa or of Kentucky, to the issues involved, is without merit. The evidence shows that the contract was an Illinois contract and practically all dealings between the parties were transacted in the City of Chicago. Both parties to the contract were coal jobbers. The defendant did not own the mines in Kentucky and has no interest in them. It was merely securing the coal there with which to meet this contract.

We find no error in the record and therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS.  
TAYLOR, P.J. DISSENTING (SEE NEXT PAGE)

~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~





MR. PRESIDING JUDGE TAYLOR DISSENTING.

Both parties being in default, if the court saw fit to take jurisdiction of the set off it ought also to take jurisdiction of the plaintiff's claim for damages. When judgment in favor of the defendant is paid, it will be made whole, while the plaintiff only is pari delicto, and at the most guilty of a lesser breach of contract, will have been denied a remedy for its claim for damages.

If one side of the contract is to be enforced, why not the other ? The obligation on the buyer to pay for coal received is no more sacred in the eyes of the law than the obligation on the seller to pay damages for a refusal to deliver.

Under the circumstances I am constrained to dissent.

THE PROSECUTION'S CASE

It is the duty of the jury to determine whether or not the defendant is guilty of the crime charged.

The evidence in this case is as follows:

The first witness is the complainant, who states that on the night of the 1st of January, 1901, he was sitting in his room at the Hotel...

When he heard the door open, he looked out and saw a man enter the room. The man was dressed in a dark coat and a hat, and he was carrying a bag.

The complainant saw the man go to the door and look out. He then returned to the room and closed the door. The complainant did not see the man again until the next morning.

The second witness is the man who was seen entering the room. He states that he was walking down the street on the night of the 1st of January, 1901, and he saw a man enter a room at the Hotel...

He saw the man enter the room and close the door. He did not see the man again until the next morning.

It is the duty of the jury to determine whether or not the defendant is guilty of the crime charged.

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The second witness is the man who was seen entering the room. He states that he was walking down the street on the night of the 1st of January, 1901, and he saw a man enter a room at the Hotel...

342 - 25422

ROSE JONES,

Appellee,

v.

CHICAGO RAILWAY COMPANY,  
et al,

Appellants.

SEVERAL YEARS

SOUTHWEST COUNTY.

ROCK COUNTY.

221 I.A. 659

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendants from a judgment of \$4,000, recovered by the plaintiff in an action for personal injuries. The plaintiff was a passenger on one of the defendant's cars, of the style known as a rear side car, having both entrance and exit at the front platform. The entrance to the car took up the front half of the platform nearest the dashboard and the exit from the car took up the right half of the platform next to the body of the car. An upright steel rod, running from the platform floor to the roof of the car, separated the entrance from the exit. When the car was in motion the platform was enclosed by means of doors at both the entrance and the exit. The steps leading up to the platform at both the entrance and the exit were separate and each was connected with the entrance and exit doors respectively so to operate in synchronation with them. When the entrance and exit doors were closed the steps were folded up in a perpendicular position and when the doors were opened the steps were in a horizontal position, where they could be used by passengers in entering or leaving the car. Each door was in two parts and when they were opened the entrance door folded up against



the dashboard and the exit door folded up against the body of the car. These doors were operated by the motorman by means of two levers at his right hand and each could be operated separately or they could be operated together by one motion. The plaintiff and her husband lived on Kenwood avenue near 55th street in the City of Chicago. About four o'clock in the afternoon of May 3, 1915, they were passengers in the car in question, which was proceeding along 55th street in an easterly direction. Shortly before the car reached Kenwood avenue, an unusually severe rain storm came on and continued until after the occurrence in question. The car stopped on the west side of Kenwood avenue and the witnesses for the respective parties are in conflict as to what occurred after that.

The plaintiff testified that as the car reached Kenwood avenue, "I was standing in the door ready to get off and the motorman \* \* \* opened the door partly,\* \* \* I got out and as I got on the \* \* \* step, it wasn't level, it wasn't down and it was shaky, and the next thing I knew I slipped and fell from that shaky step and went over," falling into the street. As a result of the fall the plaintiff suffered a fracture of the left femur. It is shown that when she fell, the conductor, whose position on the type of car involved here, was on the front platform, left the car and assisted the plaintiff's husband in carrying her into the store on the corner, where a doctor was summoned from an office upstairs, and a few minutes later the conductor again assisted the plaintiff's husband and others in carrying her to her home which was on the opposite side of Kenwood avenue and a few doors from 55th street. The motorman remained with the car which was necessar-





ily detained some fifteen minutes and when the conductor returned the car proceeded. In cross-examination the plaintiff testified that no passengers left the car ahead of her but that she was the first one to step down from the platform and that as she stepped down "the step was up and shaky. It was raining so that I could just see. I saw the step was up \* \* \* I slipped and fell as soon as I stepped down on it. I saw the step before I stepped on it. I saw it was not level. It was tilted up from the door. The outside edge was tilted up a little instead of being perfectly flat. It wasn't quite down \* \* \* within a couple of inches \* \* \* when I got on it I slipped and fell over. It was shaky and I slipped and fell over \* \* \* I got out on that step thinking that if he (the motorman) had control of that car it was safe enough for me to step upon it \* \* \* The first thing I knew I was up in the air and down." Further, on cross-examination, the plaintiff denied that she got off the car in safety and walked several steps toward the curbstone and then slipped and fell and she also denied that she had told any nurse in the hospital that she got off the car all right and walked a few steps and then caught her foot in her dress and then slipped in some way and thus fell to the street but that "I always told the nurses there that the step was tilted up and that was what caused me to fall." She testified further that when she put her foot on the step "it did not settle the step right down level. I didn't have a chance to come down with the other foot. I was up in the air and over, slipped up in the air and over on my left side." It appears that the plaintiff's injury was not diagnosed as a fractured femur until one or three days after the accident and she was then removed to the Lake-



side Hospital.

The plaintiff's husband was not living with her at the time of the trial, there having been a separation since the occurrence which is the basis of this suit. He appeared under subpoena and testified and there is some conflict on the point as to whether he was a willing or unwilling witness. He testified that he was directly behind his wife as the car stopped at Kenwood avenue and the motorman only partly opened the front door; that his wife was right in front of the door; that he saw her step on the step with one foot "and then the next thing, she fell \* \* \* When my wife stepped on the step I was right behind her and I could see that the step was tilted because the door was not open. \* \* \* The door \* \* \* was narrow, my wife could just get through." On cross-examination he testified that his wife was the first passenger to get off the car and further that when the motorman opened the door he didn't look out and see whether the step was tilted up or not; that his wife was in front of him and that he could not "look out and see if the step was tilted up. When she stepped out then I could see, but I couldn't see through her, part of the door was open. I could not see the step before she stepped on it. After she stepped on it, it was tilted up. \* \* \* My wife was probably a foot away from the car when she fell. \* \* \* She fell probably a foot away from the side of the car. It wasn't 5 or 10 feet. It was asphalt pavement there. It was raining and the pavement was as slippery as any pavement is at such a time. She was not hurrying. She didn't have an umbrella."

When this case was reached for trial the plaintiff presented an affidavit for a continuance, representing that





one Frank Hickey, a material witness, was absent from the jurisdiction of the court and could not be produced and that if present he would testify "that on or about the third day of May 1915, the plaintiff was a passenger upon a car of the defendants, which stopped to let off passengers at Kenwood avenue and 35th street, the said car being an east bound car, at about 4:30 or 5:00 o'clock in the afternoon; that there was a rainfall at the time and the door of the car was only partially opened by the companies' employee so that the step of the car was not level; that the plaintiff stepped from the top step to the lower step (in leaving the car) which was not level, which caused her to slip and fall, breaking her hip. That the car fully stopped and the door only partially opened and left in that manner when plaintiff descended." To avoid a continuance, counsel for defendants admitted that if the absent witness were present he would testify as set forth in the affidavit, whereupon, the trial proceeded and in due time the statement of the evidence of the absent witness, as quoted above, was read to the jury and thereupon the plaintiff rested.

The defendants represented that one witness of the occurrence that they had expected to testify, had died since the accident had happened and that another was absent in the service. The motorman, the conductor and a mechanic, familiar with the operation of the entrance and exit doors and steps, each gave testimony describing such operation in some detail, and stated that if the lever operating either set of these doors was pulled back far enough to open the doors and lower the corresponding step more than half way, the doors would continue beyond that point until fully opened and the step



would continue beyond that point until it reached a complete horizontal position, without any further pull of the lever. The motorman testified that as his car reached Fenwood avenue on the afternoon in question, it was raining hard and the street was wet; that he stopped on the near side of Fenwood avenue and the car stood perfectly still. He further testified that "I opened both sets of doors, the exit and the entrance \* \* \* There were about 4 or 5 people to get on and quite a number got off, \* \* \* Mrs. Peters was not the first one off. There were three or four people got off before she did, \* \* \* at the exit door \* \* \* and six or seven or eight people got off after she got off. \* \* \* I opened both sets of doors all the way open. The steps go down when the doors are open. The steps were both of them flat down \* \* \* When the first two or three people got off I saw Mrs. Peters get off. When she got off the car she started for the sidewalk. \* \* \* There was no fall in getting off the car. \* \* \* She got clear off the car over almost to the curbstone and she turned, - \* \* \* It looked to me as if her foot slipped on this asphalt \* \* \* She must have gone 4 or 5 feet away from the car before she started to turn \* \* \* She was hurrying. \* \* \* As Mrs. Peters got off the car she took hold of the dividing rod with her left hand." On cross-examination the motorman testified that the plaintiff was almost to the curb when she fell; that the street inclined there quite a little bit; that he got the names of those on the platform who saw the accident but did not get the names of anybody that got off the car. He further testified "In these cases anyone that gets off our car, that falls after getting off our car, we are supposed to take the names of people as





witnesses. If they get off the car and walk to the sidewalk and fall, we are supposed to get the names of those people. The fact that her accident didn't have anything to do with our car didn't prevent me from getting witnesses. I went and got all the witnesses I could get. . . . My car didn't have anything to do with her fall at all." He also testified that some witnesses whose names he requested, refused to give their names; that he took the name of a police officer who was standing on the front platform and that the name of another witness he got was Tank (deceased) and another was Oripentaple, (in the Army).

The police officer testified that at the time of the occurrence in question he was standing on the front platform and saw the plaintiff when she was getting off the car; that she got off in a hurry and didn't grab anything as she was getting off. The door through which she went was open. ~~XXXXXXXXXXXXXXXXXXXX~~ The step was in the regular position, it was down, it was flat. She got down on the street and seemed to have lost control of herself, and she fell as she got on the street." On cross-examination he testified that upon the occasion in question he was on the way to his station and that when he reached there he made a report of the accident in which he stated that the plaintiff "fell as she was stepping off" the car, and also that his report mentioned Hookey as a witness.

The conductor testified that he was in his position on the front platform when the car reached Howard avenue; that both doors were open all the way; that he saw the plaintiff when she got off; that she was not the first one off but there were several people that left before she did and





there were also some that left after; that she used the same step that had been used by the passengers who preceded her in leaving the car; that "after the first two or three got off, I saw her fall on the pavement. She took hold of the center rod with her left hand and stepped off the car on to the pavement. Then she fell after she had gone a little way from the car, about three or four feet." He further testified that he left the car to assist the plaintiff and helped carry her into the nearest store where he remained about fifteen minutes, "because we called a doctor and we found out her home was right nearby \* \* \* We helped to carry her over to her own home \* \* \* I was gone from the car all told about fifteen or seventeen minutes before I got back." On cross-examination the conductor was asked, "So Mrs. Peters was extremely careful and took hold of this (center rod) with her left hand. Is that right? and he answered, "Yes sir", and then stated "Then she walked three or four feet away from the car and then she fell. \* \* \* She turned and faced south, slipped as she was going on the incline, the incline being very wet, there was very great chances for her slipping. \* \* \* She was somewhere along ten feet from the edge of the walk when she fell \* \* \* My car had nothing to do with the accident at all as far as I know. \* \* \* But Mrs. Peters had been a passenger and that was the reason I took her husband's name and hers and her residence. \* \* \* The lady didn't get off in a hurry, nobody rushed her. I wouldn't say she took it sort of easy because it was raining and she would be glad to get under shelter. She hurried a little bit."

The plaintiff was in the hospital for a period of seven weeks. When she went into the hospital, one Jean



Johnston, a nurse took care of her and put on a plaster cast. This nurse testified that the case was diagnosed as a fractured femur and that the plaintiff told her "that she was getting off of the car and stepped on her skirt and fell." On cross-examination this witness stated that it was about a year before the trial that someone first questioned her about this conversation; that one thing which particularly called the plaintiff's statement to her mind was "that I had to give her such a good scrubbing. I was called to get her clean. That is the reason I thought of it. \* \* \* She told me she was at home for several days before they brought her to the hospital."

During the time the plaintiff was in the hospital another nurse, Mrs. Parsons, acted as the floor nurse on the floor where the plaintiff's room was located and took care of her each morning and answered the bell whenever she would call during the day. This witness testified that the plaintiff told her "that when she alighted from the street car that she caught her foot and fell. She said that she thought she caught it in her dress." On cross-examination she stated that she had not been asked about this conversation until the day previous to the time she was testifying; that she had never discussed the matter with the other nurse, Mrs. Johnston; that during her period of service at the hospital she remembered caring for only two street car accident cases, one of which was the plaintiff's; that her recollection was that the time of the plaintiff's accident was in April or May but she did not remember the date nor did she remember where the accident had occurred but she thought the plaintiff told her that the day of her accident "was a miserable day,





and it was raining."

On re-direct, the plaintiff took the stand and denied that she had ever told either Mrs. Johnston or Mrs. Parsons that she had stepped on her dress and fallen.

In support of the appeal the defendants contend that counsel for the plaintiff indulged in such argument to the jury as requires a reversal of the judgment. In his closing argument plaintiff's counsel, among other things said "Now, my distinguished brother in his foxy little way, after being so extremely diligent and persistent in getting me into this case, after he knew my witness was away -". Counsel for defendants interposed an objection at this point and the court sustained it saying, "The jury has nothing to do with that." Plaintiff's counsel then said, "I guess that is probably true." The court added, "The court decided that question." Counsel for the defendants preserved his exception to the remarks of counsel for the plaintiff and the latter then, apparently turning to the jury, said "The fact remains, gentlemen of the jury, just the same -", and again counsel for the defendants objected and the Court said, "The jury will be instructed to disregard anything counsel has said about being forced into trial. That is a matter that the jury has nothing to do with." This argument was of course entirely without justification and where the case was a difficult one for the plaintiff, on the facts, there is ground for the defendants' contention that it was indulged in by counsel for the plaintiff solely for the purpose of appealing to the feelings of the jury and not their judgment. It was for the court to rule on the question of a continuance and the court had ruled and the argument objected to was in the nature of an appeal by counsel



from the judgment of the court to the sympathy of the jury and such action has no proper place in the trial of a law suit.

In his closing argument counsel for plaintiff further argued, to the jury "In order to go into the trial of this case, it was necessary for counsel to admit that if Mr. Hockey were here he would testify to these facts." At this point counsel for the defendants interrupted and stated that he had not admitted the truth of Hockey's testimony but simply that he would testify as alleged, if present. Counsel for plaintiff then proceeded, "Mr. Hockey's name was on the police report and Mr. Hockey was available as a witness, and if they were willing to admit that if here he would so testify, - they know just as well as I know whether or not he would so testify - and if it was not true that he would so testify, they would not admit it; so that he cannot so cavalierly wave him out; it is a question of the testimony of this man Hockey; and he cannot crawl out of it, after he has admitted it here and he got me into the trial \* \* \* The testimony of Hockey was true, they admitted it was true, he said it was true; he saw it - "Here counsel for defendants interrupted saying that he had never admitted that it was true and then counsel for plaintiff proceeded, "You admit it was true, because if it was not true, you would never have admitted he would have so testified if he came here." Counsel for defendants objected and the court said, "There is no such admission. Proceed." Counsel for the defendants excepted to the argument of counsel for the plaintiff and the latter then proceeded to argue to the jury that the fact that defendants had admitted that Hockey would testify as alleged if present, raised the inference that such testimony was true. This argument also was highly improper.

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But it is the opinion of a majority of this court that the verdict and judgment for the plaintiff should not be disturbed on this ground, for the reason that the prompt and clear rulings of the trial judge on defendants' objections to the remarks of counsel for the plaintiff, were such as to cure what would have been reversible error, without such rulings.

Further it is the opinion of a majority of this court that it cannot be said that the verdict is against the manifest weight of the evidence but that, inasmuch as the sharp conflicts in the evidence were considered by the jury and the testimony of the various witnesses weighed by them, their verdict must be permitted to stand as there is sufficient testimony in the record, if believed by the jury, to warrant the conclusion to which they came.

For the reasons stated, the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.





578 - 88638

JOSEF JILKA,

Appellant,

v.

AGNIESKA JILKA,

Appellee.

APPEAL FROM

SUPREME COURT,

COCK COUNTY.

221 I.A. 659

MR. JUSTICE THOMSON delivered the opinion of the court.

The complainant filed his bill praying for a divorce from his wife the defendant and she filed her cross-bill praying for separate maintenance. After a hearing by the Chancellor, the bill of the complainant was dismissed for want of equity and a decree was entered as prayed in the cross-bill.

Both of the parties had been married previously. At the time of this marriage the complainant was forty-five and the defendant was forty years old. Complainant has five children by his previous marriage and the defendant had two children by her previous marriage. They lived together seven months, when the defendant with her children left the home of the complainant, and she has since been living apart from him. Complainant filed his bill some twelve years after the separation, alleging desertion on the part of the defendant. In her cross-bill the defendant alleged that shortly after her marriage with the complainant "he began to demand money of her cross-complainant and to threaten her with violence upon her refusal to comply with such repeated demands and treated



your cross-complaint harshly and rendered her life miserable so that \* \* \* she was compelled, by reason of his conduct aforesaid, to live separate and apart from the cross-defendant, and from thence hitherto has so lived separate and apart without her fault and by reason of the wrong and misconduct of the cross-defendant."

In support of this appeal the complainant contends, first, that under the evidence he was entitled to a decree of divorce by reason of his wife's desertion and second, that the evidence failed to show that the defendant was entitled to separate maintenance. It is argued in support of the first proposition that to justify a wife in leaving her husband, her grievance must be such as itself would entitle her to a divorce and in support of the second proposition, that in order to entitle a wife to a decree for separate maintenance, the grounds for her living separate and apart from her husband must be of such a nature that they themselves would be ground for a divorce. Neither of these statements is correct. Our Supreme Court did say in Carter v. Carter, 62 Ill. 439, to which counsel has called our attention and in which the husband sought a divorce from his wife on the ground of desertion, "to have been justified in leaving her husband, his conduct should have been such as, if continued for the statutory period, would have authorized the decreeing of a divorce." In Fritz v. Fritz, 138 Ill. 436, the Supreme Court said, "It has been held that 'reasonable cause which justifies a wife's desertion and abandonment of her husband must be such as would entitle her to a divorce'", citing Kahbach v. Kahbach, 83 Pa. State, 343. In Fallon v. Fallon, 114 Ill. App. 116, that statement is repeated citing the case of Fritz v. Fritz, supra. All these cases were divorce





actions purely and no question of separate maintenance was in any way involved.

It has been repeatedly held and is the established rule of this state that in order to maintain a bill for separate maintenance, a wife is not obliged to show that she has statutory grounds for divorce, but merely that she is living separate and apart from her husband without her fault and it is sufficient if she establishes a persistent and unjustifiable course of conduct on the part of her husband, which necessarily renders her life miserable. Johnson v. Schoon, 48 Ill. App. 883; Hellmanson v. Hellmanson, 113 Ill. App. 81; Winterberg v. Winterberg, 177 Ill. App. 493; Johanson v. Johanson, 138 Ill. 516.

This is the rule, whether the conduct complained of has caused the wife to leave her husband or has culminated in the husband leaving his wife. In Ross v. Ross, 88 Ill. 369, the Supreme Court held that a wife was entitled to separate maintenance under the statute, where she was living separate and apart from her husband without her fault, and the court said, "without her fault" meant, under such circumstances as would enable her to avail herself of the common law remedy of obtaining support and maintenance suitable to the condition of the parties involved, upon the credit of her husband. The Supreme Court rendered this decision in construing the Separate Maintenance Act of 1867, which was identical in terms with our present Act on that subject. The husband, by the common law, was bound to provide his wife with necessaries suitable to their station and condition in life. By reason of that duty attaching to the husband it was held, at common law, that if a husband abandoned his wife or the separation was caused by improper treatment on his part or he assented to the separation

the following conditions: (a) the person to be appointed must be a  
resident of the State of New York.

(b) the person must be a member of the State Bar of New York.

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or acquiesced in it, without any provision for her maintenance, the husband was liable for her necessities. Hyam v. Fisher, 10 Ill. 509; 2 Kent's Com. 148. It therefore follows that a husband and wife may separate, by the wife leaving her husband's home and living separate and apart from him under such circumstances as would make the husband liable at common law for necessities furnished to her or as would entitle her to separate maintenance under our present statute, although the circumstances would not be such as would entitle the wife to a decree of divorce and in such a situation, where the husband filed a bill for divorce against the wife, charging desertion, the wife would be in a position to justify her conduct in leaving her husband and in case she filed a cross-bill for separate maintenance she would be entitled to a decree.

In our opinion, the Chancellor was clearly right in concluding from the evidence that the complainant was not entitled to a divorce from his wife on the ground of her desertion and while the evidence may not be said to make out a strong case in her favor we are unable to say from the evidence that the Chancellor erred in granting her a decree for separate maintenance. On his own direct examination, complainant in relating an incident immediately preceding the separation, said that he had scolded his wife because the children were dirty and when he returned from work no supper had been prepared and he found his wife lying in bed, where the evidence showed she had been for two or three days and at that time, he testified he told her, "If she would not get out of bed he would throw her out tomorrow. She said she would get out." He said there had been occurrences of a similar nature previously. "a couple of times." It appears from the evidence that the following day the defendant gathered up her belongings

The first of these is the fact that the population of the United States in 1888 was 50,000,000, and the population of the United States in 1887 was 48,000,000. This shows a population increase of 2,000,000 in one year. The second fact is that the population of the United States in 1888 was 50,000,000, and the population of the United States in 1887 was 48,000,000. This shows a population increase of 2,000,000 in one year. The third fact is that the population of the United States in 1888 was 50,000,000, and the population of the United States in 1887 was 48,000,000. This shows a population increase of 2,000,000 in one year.

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and left the complainant's home with her children and that her husband returned home from work before she departed and she told him she was going and bid him goodbye and he made no effort to induce her to remain and that after the separation she had never made any effort to return. The complainant's explanation of his statement to his wife that if she didn't get out of bed the next day he would throw her out, was that he meant she should get up. If that was the purport of the scolding he gave his wife on the occasion in question and of the particular remark referred to, it seems strange that he did not make some effort to explain it to her, when, upon his return from work the following day, he found she had understood he had threatened to put her out and had taken him at his word and was apparently vacating the premises to avoid being thrown out. On cross-examination, one of the complainant's daughters in referring to this occurrence when the defendant was in bed three days, said that "she got sick;" that her father and the defendant had had "a little scrap about the children"; that it was the same kind of "scrap" they had had before,- always about the children; that her aunt told her the defendant was sick "from being angered"; that the defendant had been sick on a previous occasion, "after she had had a little operation". From the testimony it appears that on that previous occasion referred to, the defendant had suffered a miscarriage.

The defendant testified that she left her husband because he did not give her enough to eat and that he did not provide her with money to make purchases of food for the family at the neighborhood stores but arranged to get such supplies on credit by means of a book which he turned over to his daughter and that with this book she made the purchase





and the defendant says that her children did not have enough to eat. She testified further, that her husband repeatedly told her that other people had told him that she had money (presumably left her by her first husband) and he complained because she would not give it to him; that this occurred quite often. She further testified that for three months after their marriage the complainant supplied her with money but after that he gave her nothing at all, but all the supplies were purchased by the daughter through the bank referred to and that she finally left her husband because he said he would throw her out. On cross-examination she testified that on the occasion when she remained in bed for three days, she was sick, and upon being asked what the trouble was she said, "He always used to trouble me and tell me he would chase me out and from the sorrows and thinking over of it, I got sick" and "when I was sick and lying in bed he used to holler at me because I didn't get up and work." She also testified that when her husband used to tell her he would throw her out she "thought he was chasing me out of the house, that I should go \* \* \* every time we had an argument he would tell me to get out"; that his children wanted to chase her children out; that on the evening before she left "he told me that if I would not get up he would throw me out \* \* \* That same day when he said he would throw me out in the evening, I decided to move."

No complaint is made of the amount allowed the defendant and cross-complainant in the way of separate maintenance. For the reasons stated the decree of the Superior Court is affirmed.



388 - 25649

A. C. STANTON,

Appellee,

v.

IRONATION TOWNSHIP HIGH  
SCHOOL BOARD OF EDUCA-  
TION,

Appellant.

APPEAL FROM

COUNTY COURT,

COCK COUNTY.

221 T.A. 659

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Stanton, entered into a written contract with the defendant Board of Education, by the terms of which he was to act as an instructor in the high school in certain subjects for a term of ten months, beginning September 4, 1917, and in return for such services the Board agreed to pay him as compensation \$180 per school month. The plaintiff entered upon his duties under this contract and continued to teach in the high school until sometime in the month of December, when he left to take a position which had been offered him in another school. He was paid his stipulated salary for the first three months of his service but he served for one-third of a month beyond that, for which he had not been paid. He claimed that under his contract he was entitled to the sum of \$50 for the latter period. The Board refused to pay him and he brought this action to recover the amount claimed. In his declaration he alleged the contract and set forth his period of service and the fact that he had not been paid for the one-third of the school month of December, at the end of which time he alleged that "by mutual agreement by and between the said plain-





tiff and said defendant the said employment was ceased and terminated." A hearing was had before a jury and a verdict was returned for the plaintiff, assessing his damages at the amount claimed. Judgment was entered accordingly, to reverse which the defendant has perfected this appeal.

In support of the appeal the defendant contends that the trial court erred in admitting parol evidence on the question of what, if any, action had been taken by it with regard to the subject-matter of this controversy. On this question the Secretary of the defendant Board of Education testified that a part of his duties was to keep a record of the proceedings of the board and that there was a meeting held by the board in November 1917, at which there might have been an informal discussion by the members of the board as to the plaintiff leaving his position as a teacher in the high school. It would seem from the record that the secretary's report of the meeting showed no action taken at that time. The witness further testified that he had no record of any meeting of the board subsequent to the one just referred to, at which any action regarding the plaintiff leaving the school, was taken. One Smith, the principal of the school, was permitted to testify that at the November meeting referred to, he made a report to the Board of Education to the effect that the plaintiff had told him that he had an offer in another school "and that he was resigning and wanted the board to accept this resignation so that he could accept the Crane position." He further testified that considerable discussion followed between the members of the board and complaint was made to the effect that the plaintiff was not doing the fair thing regarding his contract and that it was finally decided to refer the matter of his resignation to the Teacher's Committee, with power to act, in per



opinion the admission of the latter testimony was error. Section 112 of chapter 122 of the Statutes of Illinois requires that a record of the official acts of boards of school directors shall be kept by the clerk. The only way to prove such official acts is by such record as the law requires shall be kept. Routman v. Slater, 208 Ill. App. 487.

But even if the evidence in this case established such action by the defendant Board, namely, that the matter of the plaintiff's resignation was referred to the School Committee, with power to act, it would be necessary to reverse the judgment of the trial court inasmuch as the verdict and judgment are wholly unsupported by the evidence, for it was not shown that the School Committee acted. Such evidence as we find in the record on that question tends rather to the contrary. It is shown that the chairman of the School Committee was a Mr. McFougall and that the plaintiff had certain conversations with him. What they were the evidence does not disclose. Assuming such evidence to have been admissible the plaintiff has assigned no cross errors in relation to the action of the court in sustaining the objections interposed. The evidence does show that the principal, Smith, made some efforts to secure a teacher to take the plaintiff's place, after the latter had advised him of his desire to resign, but the secretary of the Board testified that the records of the Board showed nothing regarding the employment of any instructor to take up the courses which had been conducted by the plaintiff up to the time he left. It appears that shortly after the plaintiff left, a Mr. Brockley was won then a member of the teaching force of the school, took up the courses which the plaintiff had been teaching. The principal testified





that the plaintiff "had left suddenly, and there had to be some provision made for these courses and I studied the schedule and readjusted the courses as Mr. Breckley could do that \* \* \* I don't remember that the board took any action in the matter \* \* \* When Mr. Stanton left that left my teaching force quite short. I had to assign someone else to take his place or hire a successor. We had to act immediately as there was an emergency. Mr. Breckley was prepared to do that sort of work. Mr. Stanton taught Botany and Zoology. When he left we were without a teacher of Botany and Zoology. Mr. Stanton left suddenly. Prior to the day he left I did not know that he was going to leave. He had not told me the preceding day. I learned it the next morning when we found his keys on his desk." Certainly that is far from proving that the written contract declared on had been terminated by mutual agreement, as the plaintiff alleged.

Having entered into a written contract to render his services for the period of a year and having discontinued his services under the sole claim that the contract had been terminated by mutual consent, and the evidence failing to establish that fact, the plaintiff cannot recover upon a quantum meruit under the common counts. Muscell v. Erickson, 28 Ill. 257.

For the reasons stated the judgment of the County Court is reversed.

REVEREND.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.





407 - 23668

HENRY SIERKE,

Appellee,

v.

WEAVER MEMORIAL CHURCH OF  
THE UNITED BAPTIST IN  
CHRIST, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 660

MR. JUSTICE THOMSON delivered the opinion of  
the court.

This was a fourth class action in the Municipal Court of Chicago, whereby the plaintiff Sierke sought to recover from the defendant, for professional services performed by him as an architect at the request of the defendant by its agent, for which he alleged the defendant promised to pay what said services were reasonably worth. The amount claimed was \$470.55. The affidavit of merits set up that the defendant had authorized its pastor, one Whimssett, to agree with the plaintiff that the latter should draw plans and specifications and also secure bids and supervise the construction of a parsonage and an addition to the church building, at a cost of not more than \$10,000 for a compensation of two and one-half per cent of the cost price, to be paid when all of the work was completed; that Whimssett was the only person authorized to act for the defendant in this matter; that no dealings were had with the plaintiff other than through Whimssett; that any agreement which the latter had made with the plaintiff other than in accord with said special agency was wholly unauthorized. The issues were heard by the court without a jury, resulting in a finding and judgment



for the plaintiff for the sum of \$467.50, to reverse which the defendant has perfected this appeal.

In support of the appeal the defendant urges a number of matters of law which are doubtless correct but which, in our opinion, have no application to the facts disclosed by the evidence. The plaintiff testified that he was introduced to Mr. Whinnett by one Langeleh, a contractor; that Whinnett told him of the work that they wanted to do at the church and that after this conversation, which was at the house of the contractor, they went over to the church and Whinnett pointed out what was to be done and that nothing was said by Whinnett in either of these conversations as to any limitation of cost. He testified further that he made certain pencil drawings in accordance with the instructions of Whinnett and then went over to see him and at Whinnett's request he went to meet the trustees, being introduced to the latter by Whinnett; that he explained the pencil drawings to the trustees and "they told me to go ahead and complete the drawings. Nothing was said about any cost limitation." The plaintiff did furnish the drawings, solicited bids which totalled \$18,700 and the matter was dropped there, the construction of the improvement apparently being abandoned. Langeleh testified that he was present during all of the conversations between the plaintiff and Whinnett at his house and also most of the time during the conversation which they had at the church and that nothing was said in his presence about any price limit on the work which was to be done. Whinnett testified (by deposition) that he told the plaintiff they wanted to put up an addition costing about \$8,000 but not to exceed \$10,000 and that the plaintiff assured him that the changes they





wanted could be made and would not cost more than \$8,000; that some time later the plaintiff presented to him a proposed plan and he told the plaintiff it would have to be shown to the trustees; that he later conferred with the plaintiff at the latter's office, returning the plans to the plaintiff and telling him that in general they met with the approval of the trustees, and that he again cautioned him about the cost and asked him what his fee would be and that he said that inasmuch as it was a church, he would do it for two and one-half per cent. The deposition of Whinnett was the only evidence offered by the defendant.

The finding of the court was doubtless based on the court's conclusion that Whinnett had not placed any limitation of cost on the improvement, in his talks with the plaintiff. We cannot say from the record that the overwhelming weight of the evidence was to the contrary. Furthermore, when the plaintiff presented his preliminary pencil sketches to the Board of Trustees and went over them with the Board and the latter approved the sketches and directed the plaintiff to proceed with the preparation of his detailed drawings and specifications, they ratified the action of Whinnett in making the arrangements he had made with the plaintiff for the preparation of the drawings. The contention of the defendant that this action of the trustees could not have amounted to a ratification, because it was done without any knowledge on the part of the Board as to what had been said by Whinnett to the plaintiff in their previous conversations, is untenable. At the time the Board took this action they had before them the plaintiff's preliminary sketches and they must be deemed to have acted with all the knowledge that these sketches im-



plied. The Board itself directed the plaintiff to do the work which is the basis for this claim, after they had made an examination of his preliminary sketches and under that evidence it would seem that he proved an agreement between himself and the Board direct, which would be sufficient to support the judgment. It was stipulated that two and one-half per cent of the amount of the costs of the proposed improvement would be the usual, reasonable and customary charge for the services of an architect in drawing the plans and securing the bids.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P. J. CONCURS;  
O'CONNOR, J. DISSENTS.



GRACE D. LUTHER COULTER and  
REITH MAY CURTIS,

Appellants,

v.

JOSEPH DAVIDSON, JOSEPH E. DAVIDSON,  
FRANCIS S. DAVIDSON and JOHN E.  
DAVIDSON,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

221 I.A. 660

MR. JUSTICE THOMSON delivered the opinion of  
the court.

One John Elsey died testate, and by his will he gave, devised and bequeathed all of his property to his wife "to have and to hold the same during the term of her natural life, hereby giving her full power to sell, use or dispose of, for her own use and benefits, and to invest and reinvest the same as if she were the sole and absolute owner thereof", with a gift over to certain nieces, two of whom were the complainants who filed this bill. After the death of John Elsey, his wife took out a policy of insurance for \$5,000, making the defendants her beneficiaries. The annual premium on this policy was \$680.90 and she paid out a total of \$5,878.10 as premiums before her death. She was 64 years of age when she took out the policy and 72 years of age at the time of her death. After the death of the widow, the complainants discovered these facts and thereupon filed this bill, contending that the property of the estate of John Elsey in the hands of his widow and in which she had a life estate, constituted a trust fund and that the amount so used by her in payment of the premiums as above described, was not a use of the property for her "use and benefit" within the mean-





Figure 1.1: A line graph showing two data series over time.

The graph illustrates the relationship between two variables over a period of 20 years. The first series, 'Series 1', shows a consistent downward trend, while the second series, 'Series 2', shows a consistent upward trend. The intersection point at 1990 indicates a significant shift in the relative values of the two series.

The data presented in the graph is as follows:

| Year | Series 1 (Value) | Series 2 (Value) |
|------|------------------|------------------|
| 1980 | 80               | 20               |
| 1985 | 60               | 40               |
| 1990 | 50               | 50               |
| 1995 | 40               | 60               |
| 2000 | 20               | 80               |

The graph demonstrates a clear inverse relationship between the two series over the 20-year period. The first series starts at a high value and decreases, while the second series starts at a low value and increases, eventually surpassing the first series around 1990.

The data presented in the graph is as follows:

| Year | Series 1 (Value) | Series 2 (Value) |
|------|------------------|------------------|
| 1980 | 80               | 20               |
| 1985 | 60               | 40               |
| 1990 | 50               | 50               |
| 1995 | 40               | 60               |
| 2000 | 20               | 80               |

The graph demonstrates a clear inverse relationship between the two series over the 20-year period. The first series starts at a high value and decreases, while the second series starts at a low value and increases, eventually surpassing the first series around 1990.

ing of the will and praying that an accounting might be taken of the amounts of money collected by each of the defendants under said insurance policy and that they might be decreed to pay to complainants and other legatees under the will of John Elsey, the said amount of \$3073.10, so alleged to have been diverted and illegally paid out of the funds of the said trust estate for premiums due under the terms of the policy, together with interest thereon. After a hearing before the chancellor, the bill was dismissed for want of equity. By this appeal the complainants seek a reversal of that decree.

There was no dispute between the parties about the facts involved and the complainants submit in this court "that the only question in this case is one of law as applied to the will of John Elsey." In support of their appeal, complainants have called our attention to many decisions, all of which construe language similar to that involved here, and hold that where property is given by will to a life tenant for his or her use and benefit, with power to sell, the life tenant is not given an absolute right to dispose of the principal of the estate, but is only given such use of the property as is consistent with that of a life owner. As was said by our Supreme Court in Pratt v. Skiff, 249 Ill. 268, at page 274. "The rule is well settled in this state that where a power of disposal accompanies a bequest or devise of a life estate, the power of disposal is only coextensive with the estate which the devisee taken under the will and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended." But in our view of the case, these decisions are not applicable to the situation disclosed here.



The theory of the complainants is that the personal property belonging to the estate of John Elsey, which came into the possession of his widow as a life tenant, became trust property and that they have the right to follow that property in the hands of the defendants. The burden was upon complainants to prove that the funds sought to be reached in the hands of the defendants, was trust property belonging to John Elsey's Estate, (Moore v. Taylor, 251 Ill. 466) or that the funds paid out by the widow in payment of the insurance premiums were made from the principal of the estate and not from income. This the complainants failed to do.

From a consideration of all the evidence in this record, we cannot say that John Elsey's widow disposed of any of the principal of the alleged trust fund in which she had a life interest, in paying the premiums due on this policy of insurance from year to year. It may well have been that such payments were made by her out of her personal funds and such income as came to her from year to year from the property in which she had the life estate. It is quite apparent from the language of the will that the deceased had no intention that the income derived from the property, in which his wife was given a life interest, was to be allowed to accumulate. Under the will, his widow had an absolute right to use all the income as derived, as she saw fit and to do with it as she pleased, and was under no obligation to account for it to anyone. As was said in Ellis v. Flansigan, 279 Ill. 23, in construing a similar provision, on a bill filed on the theory invoked by the complainants in the case at bar, "The gift of the life estate carried with it the unrestricted use of the income." In that case, our Supreme Court holds that such a devise as is involved in the case at bar, does not create a trust. See also Org v.





Gates, 209 Ill. 322. That the widow derived some income from the property is not questioned by complainants and that she possessed certain funds of her own is not denied by them. In their statement of the case they refer to their offer of certain evidence on the question of her individual funds and they say that the ruling of the chancellor, sustaining the defendant's objection to that testimony, is assigned as error. However, no mention of that matter is made by them in their argument and it must therefore be considered as waived by them.

In the absence of proof that the funds used to pay the premiums on the policy of insurance referred to (assuming such use to have been an improper one, for any part of the principal of the estate) were a part of the principal belonging to the estate and were not the income derived therefrom by the life tenant, or her individual funds, it was incumbent on the chancellor to dismiss complainants' bill for want of equity. Other points are made by defendants in support of the decree which we feel it unnecessary to pass upon.

For the reasons given the decree of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, R.J. AND O'CONNOR, J. CONCUR.



442 - 25706

MARGARETHA FLAHERTY.

Appellee.

v.

CHICAGO RAILWAYS COMPANY,  
CHICAGO CITY RAILWAY COMPANY  
and P. J. MURSON

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

On appeal of P. J. MURSON,

Appellant.

221 I.A. 660

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendant, Murson, from a joint judgment for \$3,500 recovered by the plaintiff against him and the defendants, Chicago Railways Company and Chicago City Railway Company. The defendant companies referred to perfected a separate appeal from that judgment, which is case #25707 in this court. That case was consolidated with this for hearing.

In the opinion which is being filed this day in case #25707, we have fully set forth all the facts involved and we will not repeat them here.

In support of his appeal the defendant, Murson, contends that the verdict was against the manifest weight of the evidence, in that it demonstrated that the collision between his funeral car and the street car was not caused by the negligence of his chauffeur, but solely by reason of the



negligence of the motorman on the street car. We have held in the other case that the jury were warranted in concluding, from the evidence, that the motorman was guilty of negligence and after a careful consideration of all the evidence, we are of the opinion that the jury was also warranted in concluding that the defendant's chauffeur was also guilty of negligence, and that the negligence of each was involved in the proximate cause for the accident in question. While we believe that the evidence establishes that the street car ran into the funeral car, we are of the opinion that it further establishes that the exercise of a proper degree of care on the part of the chauffeur would have avoided the collision. The chauffeur testified that he saw the street car standing at the east crosswalk; that he slowed down for the intersection to a speed of 4 to 5 miles an hour and that "just before" the front wheels of the funeral car got on the westbound track, the street car started up. It then appears that when the chauffeur saw this street car coming toward him instead of accelerating his speed and getting out of the way, he slowed up to about 3 or 4 miles an hour. He testified further that when he first saw the street car he was about 100 feet north of the cross walk and he was going 8 or 10 miles an hour. It will be apparent from what we have said in the other opinion, and in this, that the chauffeur saw the motorman and that the motorman saw or should have seen the chauffeur, when their vehicles were 100 feet or more apart and as they both approached their point of crossing their views were obstructed by the presence of a northbound car. In that situation, the exercise of a proper degree of care on the part of each of them, required them to approach that point of crossing with their respective vehicles under such control that they could be stopped short of the intersection. If the





chauffeur described the situation accurately and the front wheels of his vehicle reached the westbound track as the street car was starting up, he even then could have avoided the collision as we have indicated above. We are unable to say that the verdict is against the manifest weight of the evidence as to negligence of the defendant Harsen.

This defendant also contends that the court erred in the giving of the instruction quoted in the other opinion. For the reasons there given, which we will not repeat here, we are of the opinion that this contention is not tenable.

This defendant also contends that the court erred in refusing to give the jury the following instruction:

"The court instructs you that if you believe from the evidence in this case that the front wheels of the funeral car were on the westbound track on 74th street before the car in question had started up, if it so started, from the position where it was standing, if standing, on the east side of Halsted street, that then you must find the defendant, Harsen, not guilty."

Manifestly, that instruction was entirely improper. For the reasons which we have already discussed in commenting on the evidence.

The defendant Harsen also contends that the damages recovered by the plaintiff are excessive. We have discussed that point in the other opinion and will not repeat here what we have stated there. For the reasons given in that opinion we are of the opinion that this contention is also without merit.

We find no error in the record and therefore the judgment of the Circuit Court is affirmed.

AFFIRMED.



MARGARET FLAHERTY,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,  
CHICAGO CITY RAILWAY COMPANY  
AND F. J. HUNSEN,

On appeal of Chicago Railways  
Company and Chicago City Rail-  
way Company.

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 660

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Mrs. Flaherty, brought this action to recover damages for injuries received by her in a collision between a street car and a funeral car in which she was riding. The jury returned a verdict in her favor against both the street car companies and the defendant Harsen for the sum of \$5,000, of which the plaintiff remitted \$1,500, following which judgment was entered against the defendants for \$3,500. The defendant Companies perfected this appeal and the defendant Harsen perfected a separate appeal, which is case #28706 in this court. The two cases were consolidated for hearing.

The accident in question occurred at the intersection of Belmont street and 74th street, in the City of Chicago. These streets intersect at right angles and each of them contains a double line of street car tracks. The street car belonging to the defendant companies was proceeding west along



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the north track in 74th street and stopped at the east crosswalk at the Halsted street intersection, to permit certain passengers to get off and others to get on. At about this time, a large automobile funeral car, which was proceeding to a cemetery with the casket and body of the deceased and between twenty and twenty-five people, was approaching 74th street from the north in Halsted street. The funeral car was being driven with the right hand wheels a little outside of the west rail of the southbound track and the left wheels between the rails of that track. When the street car started up from the east crosswalk of Halsted street and proceeded across the intersection, there was a collision between the two vehicles, after which, the funeral car was over against the curb stone at the southwest corner of the intersection, with the top of the car leaning against a trolley pole which was located there. The injuries sustained by the plaintiff were received by her in connection with either the collision between the two vehicles or the collision between the funeral car and the trolley pole or both.

In support of their appeal the defendant companies contend that the verdict for the plaintiff was against the manifest weight of the evidence, in that the evidence shows that they were not negligent but rather that the collision was due solely to the negligence of the servant of the defendant Mursen, who was driving the funeral car. After a careful examination of all the evidence we are unable to say that the verdict is against the manifest weight of the evidence. Just before the collision, a northbound car passed over the intersection on Halsted street and there was some difference in the testimony of the various witnesses as to just where that north-



bound car was, when the westbound car started up from the east crosswalk and proceeded west on 74th street. It is the theory of the defendant companies that the westbound car started up and proceeded over the intersection slowly, with the motorman ringing his gong; that the northbound car cleared the westbound track on 74th street just as the westbound car was starting up from the east crosswalk and that it obstructed the vision of the motorman of the westbound car to some extent and prevented him from seeing any vehicles approaching from the north and that the funeral car came out from behind the northbound car, going in a southerly direction at a speed of 18 to 18 miles an hour; that the motorman put on the emergency brake and stopped as quickly as possible when he saw the funeral car emerge from behind the northbound car; that he brought his car to a dead stop, whereupon the funeral car ran into the front end of the street car, breaking the front glass of the headlight but leaving the incandescent bulb intact, and also knocking off the circular, metal box containing the rope attached to the trolley, wrenched as the retriever, and knocking it through one of the front windows on to the platform; that thereupon the funeral car veered off toward the southwest corner and landed up against the curbstone and trolley pole. The jury were justified in concluding from the testimony that the funeral car did not run into the street car but rather that the street car ran into the funeral car. The left side of the funeral car was broken in, at about the center and the photograph of the car in evidence, taken after the accident, shows no marks to the rear of that break. We are unable to find anything in the evidence to account for the movement of the funeral car from practically the center of the intersection, to the curbstone





at the southwest corner, except the blow received from the street car at the time of the collision. Some of the witnesses testified that after the collision was over, the street car was beyond the west crosswalk of Halsted street but most of the witnesses testified that the street car stood with its front end just far enough west to prevent the passage of southbound cars on Halsted street. No doubt that is the position in which the street car was, after the collision, and after the motorman and conductor had assisted in removing the people from the funeral car, the westbound car was run over the intersection beyond the west crosswalk so that it would not continue to block the Halsted street traffic. But, we do not agree with counsel for the companies in their contention that that fact demonstrates that the street car did not run into the funeral car, which was proceeding practically in the southbound Halsted street track. The accident occurred in January on a day when there was a drizzling rain and there was some slush on the streets. In our opinion, the fact that the motorman was negligent is demonstrated by his own testimony. He testified that the northbound street car on Halsted street was about half way across the westbound track when he started his car from the west crosswalk, going not over 3 miles an hour; that he first saw the funeral car when it appeared from behind the rear end of the northbound car; that the funeral car was then between 15 and 20 feet north of the track he was on and was going south in the southbound track on Halsted street; that at that time the front of his car "was just about on the northbound track". We find nothing in the evidence to account for the failure of the motorman to stop his car and avoid a collision under such circumstances. It seems entirely clear that if the situation was as the motor-



The first of these is the fact that the British Empire is not a homogeneous entity. It is a collection of many different peoples, races, and religions, each with its own customs and traditions. This diversity is one of its strengths, but it also presents challenges. The second is the fact that the British Empire is not a static entity. It has changed over time, and it will continue to change in the future. The third is the fact that the British Empire is not a monolithic entity. It is a collection of many different parts, each with its own interests and goals. The fourth is the fact that the British Empire is not a perfect entity. It has many flaws and weaknesses, and it is not always able to live up to its ideals. The fifth is the fact that the British Empire is not a simple entity. It is a complex system with many moving parts, and it is not always easy to understand. The sixth is the fact that the British Empire is not a single entity. It is a collection of many different parts, each with its own interests and goals. The seventh is the fact that the British Empire is not a static entity. It has changed over time, and it will continue to change in the future. The eighth is the fact that the British Empire is not a monolithic entity. It is a collection of many different parts, each with its own interests and goals. The ninth is the fact that the British Empire is not a perfect entity. It has many flaws and weaknesses, and it is not always able to live up to its ideals. The tenth is the fact that the British Empire is not a simple entity. It is a complex system with many moving parts, and it is not always easy to understand.

man described it, the exercise of a reasonable amount of care on his part would have avoided the collision. But, the motorman testifies further that the driver of the funeral car started to make a turn to the west and then apparently "he changed his mind" and "swung his wheel back again and the heaves came into - towards the car and crashed into it" after which it skidded off in the other direction toward the southwest curb. From the testimony of numerous other witnesses it was established that the funeral car either was proceeding straight south before and up to the time of the collision or just before the collision took place it made a slight turn to the west. The drizzling rain caused moisture to collect on the windows at the front end of the street car and the motorman says he had "cleaned the window shield in the vestibule", about a half a mile east of Halsted street. He testified also that as his car stood at the east crosswalk, he was in a position which was "considerably west of the building line", (on the west side of Halsted street) and "as I stood there I had a clear view of Halsted street." He then testified that when he started his car up, the northbound car was about half way over the track he was on and when the rear end of the northbound car left the westbound rails he was between the east curb line on Halsted street and the east rail of the northbound track. It is apparent that as the westbound car stood at the east crosswalk, the motorman of that car had a clear view of Halsted street to the north and this view was unobstructed up to the time he started his car and at that time the funeral car was, of course, in plain sight coming from the north. A reasonable exercise of care on the part of the motorman would have furnished him the knowledge that the funeral car coming from the north was approaching the inter-



section over which he was about to pass and with the weather conditions as we have described them it was incumbent upon him to use a greater precaution than he apparently did in proceeding over the intersection. Numerous witnesses gave testimony on this question but it is hardly possible to analyze it all within the limits of this opinion. We have examined it all carefully and are of the opinion that it fully warranted the conclusion of the jury that the defendant companies were guilty of negligence.

The defendant companies further contend that the court erred in giving the following instruction:

"The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances attending the plaintiff's injury, if any, as proved by the evidence before them; the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence, her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence in this case she has sustained or will sustain by reason of such injuries, her inability to work, if any, on account of such injuries, all ~~damages~~ necessarily paid or become liable for for doctor's bills, if any, while being treated for such injuries and may find for her such sum as in the judgment of the jury under the evidence and instructions of the court in this case will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration not exceeding however the sum of ten thousand dollars."

In our opinion this instruction is not subject to the objections urged against it. It is contended that the instruction does not limit the damages recoverable, to those proven on the trial, but permits recovery of all damages al-





leged in the declaration. We do not so read it. The instruction distinctly tells the jury that they may award the plaintiff (should they determine the issues in her favor) such sum as in their judgment "under the evidence and instructions of the court," would be a fair compensation for the injuries sustained, if any, as far as they are claimed and alleged in the declaration. The defendants contended further that by this instruction, the jury were directed they might award damages for loss of time as a result of the injuries and that this was error as there was no proof as to such damages although the declaration alleged that by reason of the injuries complained of, the plaintiff had been prevented from attending to her usual affairs and work and had "thereby lost divers great gains and profits she would have made." This objection is untenable. There is no reference in the instruction covering the possible allowance of damages for plaintiff's loss of time, as there was in the instruction involved in the case of Levitan v. N. E. Ry. Co., 303 Ill. App. 448, to which counsel has called our attention. The instruction here complained of does cover the allowance of damages for plaintiff's "inability to work," if any, on account of such injuries. Defendant's base their objection on the fact that the evidence showed that the plaintiff had a number of roomers and that she testified that she had been able to care for all the rooms herself before this accident but since then she had not been able to do so and had been obliged to employ help for that purpose but that the evidence failed to show either the value of her own services or the amount she had been obliged to pay to others to perform the work of caring for her rooms during the period of her disability. The plaintiff's



"inability to work" is quite a different thing from "loss of time". As was said in Chicago & Milwaukee Electric Ry. Co. v. Kramel, 103 Ill. App. 1, "the loss of her ability to so work is a personal injury to her which may affect her in many ways peculiar to herself." Furthermore, it was entirely within the province of the jury, in case they found the issue for the plaintiff, to assess her damages, in part, on "her inability to work, if any, on account of such injuries," even though no witness may have testified as to what the extent of that inability was in dollars and cents. That is an element of damage on which, like physical injuries and suffering, the jury may assess damages from their general knowledge, observation and experience in the affairs of life without proof as to the amount of such damages. In other words, this element of damages is not capable of exact pecuniary measurement. In our opinion the instruction could not reasonably be considered as referring to any damages involved in any loss or outlay the plaintiff had been obliged to suffer by reason of the employment of help in connection with the keeping of her rooms.

Finally the defendants contend that the damages recovered by the plaintiff are excessive. It would serve no purpose to discuss the evidence on this question in detail in this opinion. The record contains the testimony of several physicians covering the extent of the plaintiff's injuries as well as the plaintiff's testimony and that of one or two other witnesses who were her friends or neighbors. We are of the opinion that the evidence amply demonstrates that the plaintiff did suffer certain physical injuries and that these injuries did render her unable to engage in her usual household duties

The first part of the paper is devoted to a general  
discussion of the problem. It is shown that the  
problem is of great importance in the theory of  
the differential equations of the second order.  
The second part of the paper is devoted to a  
detailed study of the problem. It is shown that  
the problem is of great importance in the theory  
of the differential equations of the second order.  
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for a considerable period and that it cannot be reasonably said that her damages amounting to \$8,800 were excessive.

We find no error in the record and therefore the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
1100 EAST 58TH STREET  
CHICAGO, ILLINOIS 60637

RECEIVED: 11/11/1998

460 - 28721

IRVING I. SCHOTT and ALBERT  
M. SCHOTT, Co-partners, doing  
business as Schott Brothers.

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MANHATTAN GLOVE COMPANY,  
a corporation.

Appellant.

221 I.A. 661

MR. JUSTICE THOMSON delivered the opinion of  
the court.

In January, 1916, the plaintiffs entered into a  
written contract with the defendant for the purchase of 207  
dozen hogan gloves at various prices, aggregating the sum  
of \$685.35, 100 dozen to be delivered September 1, 1916 and  
99 dozen to be delivered October 15, 1916. The defendant  
failed to deliver the gloves and the plaintiffs brought  
this action to recover the damages they claim to have suffered  
by reason of defendant's breach. The issues were submitted  
to the court without a jury, resulting in a finding for the  
plaintiff and a judgment against the defendant for \$332.00,  
to reverse which the defendant has perfected this appeal.

In support of its appeal, the defendant first con-  
tends that there was no breach of the contract, in that the  
evidence showed that its inability to deliver the goods pur-  
chased was occasioned by a strike in the tanneries in Chicago,  
where the defendant was located, making it impossible to se-  
cure the raw material. The contract contained a clause reading,  
"all orders are taken subject to delay or non-delivery,  
caused by strikes, accidents, or for any reason beyond our



control." This proposition presented a question of fact as well as one of law, for the determination of the court. A strike in the tanneries, manufacturing the material used by the defendant in making the gloves, would certainly be a reason beyond the defendant's control, if that was the cause of its failure to fill the contract, but as to whether the strike referred to did in fact furnish the reason for defendant's failure to fill the contract, was the subject of testimony that was not entirely without conflict.

The defendant's superintendent testified as to the strike in the tanning industry of Chicago in May and June of 1916, lasting about sixty days and he stated that the defendant could not get the material needed to fill its contract, on the market, but he said that the defendant did not try to get it anywhere except in Chicago. He later testified that there were no tanneries outside of Chicago who manufactured hogskin leather. The secretary and manager of the defendant testified as to the strike in question and also to the effect that the defendant had tried to get material for the manufacture of these gloves but could not do so. On cross-examination he mentioned three tanning companies in Chicago, from which defendant "usually" bought this raw material but he stated that there were "quite a few others there but we did not buy goods from them"; that most of them were in Chicago but that there were others in Newark, Grand Rapids and Milwaukee; that defendant tried to purchase merchandise, such as was required for this order, from Milwaukee and Grand Rapids; that "there was no material of this kind on the market, absolutely none." There are some letters in the record written to the plaintiffs by the defendant which

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 man. The first was a very young man,  
 and the second was a very old man.



hear on this question. It appears that the plaintiffs had the idea that the defendant was going to be able to ship the gloves ordered under this contract, some weeks in advance of the dates specified, and relying upon that belief had sold the gloves to their trade for delivery on August 1, 1916, and as early as June 26, they began to urge the defendant to make shipments under the contract. Under date of June 30, 1916, the defendant wrote the plaintiffs, expressing their regret at their inability to accommodate them at that time "for the reason that we are overloaded with orders now and do not believe that we would be able to forward your order before the time specified." If there was a strike of some sixty days in the tanning industry during May and June of that year, it would seem somewhat strange that no mention was made of it in this letter, notwithstanding the fact, as the defendant points out in its brief, that it had until September 1 and October 18, to fill the contract. Under date of September 7, 1916, defendant again wrote the plaintiffs and in that letter they referred to "shortages of leather and strikes", as a reason for delays in shipments. Under date of October 3, 1916, in another letter, the defendant in giving the reason for delays in orders, refers to shortage of material and also shortage of labor. Under date of October 18, 1916, the defendant wrote the plaintiffs asking them if they would be satisfied to have their contract filled with the substitution of another material for the hogskin, and in this letter the defendant says, "For the last six months or so the leather market began to rise beyond human comprehension", because of the increased demand for leather in the United States. Reference was made to the fact that the shoe and horse saddle industries had taken all the leather they



could lay their hands on and "the glove industries were practically left without anything to speak of. Up to a few months ago there was a little bargain in the market that we could get at premium prices, but even this has been taken away from us by the other industries and we are practically left without leather to work on our orders." In that state of the record we could not say that the trial court was not justified in concluding that the defendant's failure to fill the contract was not due to the fact that it could not procure the material but rather to the rise in prices, due to an increased demand. Under such evidence as this we would not disturb a finding either way.

However, it will be necessary to reverse this judgment and remand the cause for a new trial, by reason of the error of the court in fixing the plaintiffs' damages. The amount of the plaintiffs' claim was \$836.40. One of the plaintiffs testified that by reason of the defendant's failure to deliver at the time anticipated, the plaintiffs were "compelled to go out in the open market and purchase similar gloves at the regular market value and fill a part of our orders." He further testified that they filled "about 186 dozens in that way, "and that they "had to pay about 100 per cent higher than the price quoted by the Manhattan Glove Company." The plaintiffs were apparently proceeding on the theory that their measure of damages was the difference between the contract price on the quantity they purchased in the open market and the price they actually paid for them in the open market. The plaintiffs were proceeding upon an erroneous theory as to the measure of their damages. It appears from the evidence that the gloves which were the subject of this contract, had a known market value. Under





the contract, the defendant had until September 2 to deliver 100 dozen and until October 15 to deliver the remaining 99 dozen. Assuming the defendant's liability, the measure of plaintiffs' damages, as to the 100 dozen, was the difference between the contract price and the market price on September 1, in New York and as to the 99 dozen, the difference between the contract price and the market price on October 15, at New York, except as to such quantity as the plaintiffs may have bought in the open market at a price less than the contract price, to replace the gloves contracted for and not delivered by the defendant, and as to such quantity, the measure of damages would be the difference between the contract price and prices paid. Gern Planters Refining Company v. George H. Jenkins & Co., 111. App. First Dist., Case No. 24795, not yet reported, opinion filed March 18, 1920. The plaintiffs introduced no evidence whatever as to the market price on these gloves at New York on the dates named. The testimony of the defendant was that on the dates named the prices of these gloves at New York was 10 per cent above the contract price which would have made the plaintiffs' damages amount to \$60.00, assuming that the plaintiffs had not purchased any gloves in the open market under the contract price, to replace those not delivered. But the court does not seem to have followed either the theory contended for by the plaintiffs or that contended for by the defendant as to the damages, but arbitrarily fixed them at \$500.00. We can find no basis whatever for that action, in the record.

For the reasons stated the judgment of the Municipal Court is reversed and the cause remanded to that court.

REVERSED AND REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.





422 - 29753

DELIA GARVY,

Appellee.

v.

NEWTON R. GILMORE,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 661

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought this action on the case against the defendant Gilmore and also one Miss Eron, alleging that Gilmore was a practicing attorney and that she retained him to advise her in the investment of \$1365.00 which she had in her possession; that Gilmore told her he had a client who wanted to borrow some money upon the security of property which the client owned, and he recommended that the plaintiff loan her money to this client and take a trust deed and notes of the latter, which he assured her would make a good, safe and advisable investment. She further alleged that she followed this advice and intrusted Gilmore with her money to be invested as he proposed and that shortly thereafter Gilmore delivered to her certain notes signed by Miss Eron and also a trust deed executed by the latter and conveying certain property to Gilmore as trustee to secure the payment of the notes; that at the same time Gilmore gave her his agreement in writing, guaranteeing the payment of the notes at maturity. She further alleged that the notes had come due but still remained unpaid and that there was \$1365 due on



them; that after default in the payments of the notes the plaintiff caused an investigation to be made and then discovered, for the first time, that the real borrower of her funds was Gilmore and that the latter had conveyed the property in question to Miss Kron who was a mere clerk in his employ and financially irresponsible, so as to enable her to execute the trust deed and notes and that Miss Kron was wholly without any beneficial, ownership or interest in the property in question or the proceeds of the loan, and that she further discovered that the title to the property was in one Alice, by reason of a tax deed which had been issued to him and that no abstract of title, guaranty policy or loan registration certificate of title had been furnished or provided by the defendant in connection with the loan. The plaintiff further alleged that the supposed trust deed upon the property in question was subject to a prior conveyance securing the payment of \$1200 and that the property was in an undesirable locality and in a dilapidated condition and furnished an insufficient security for the amount of her loan. The plaintiff then alleged that her funds had been secured by Gilmore and Miss Kron through their fraudulent and collusive action, as a result of which she had sustained the damages complained of.

Miss Kron duly filed her appearance, by attorney, and the defendant Gilmore filed his appearance PER SE. When the case was reached for trial, Miss Kron was present with her lawyer but the defendant Gilmore was not present. The plaintiff then dismissed as to Miss Kron and, in the absence of the defendant Gilmore, submitted evidence to a jury, as a result of which the jury found the defendant Gilmore guilty





and assessed the plaintiff's damages at \$1450.28, on which verdict the court entered judgment. This occurred on January 23, 1919. Within the term the defendant, Silasre, withdrew his personal appearance and entered the appearance of another lawyer, whereupon a motion was made in his behalf that the judgment be vacated and set aside. After a hearing of that motion the court denied it and thereupon the defendant perfected this appeal.

First, as to the order denying the defendant's motion to vacate the judgment. In support of the motion the defendant presented an affidavit setting up that he had not been engaged in active practice as a lawyer for some time prior to the beginning of this action and that he did not have an office and was not able to keep in close touch with all the trial courts; that on January 22, 1919, he was informed that this case was on the trial call but that there was a case on trial and between forty and fifty cases on the call ahead of the case at bar and that there was no probability of said case being reached for trial for more than a week; that on the evening of that day he was retained by certain complaining witnesses in a criminal case, which case was set for hearing in the South Clark Street branch of the Municipal Court in Chicago on January 23, 1919, at 9:30 A.M.; that he was engaged, in his capacity as a lawyer, in said branch of the Municipal Court on January 23, from 9:30 A.M. until 12:00 Noon of that day, and that during the balance of the day he was engaged in his capacity as an attorney, in various matters demanding his immediate attention; that on the evening of January 23 he examined the Chicago Law Bulletin and was unable to find the case at bar on any of the calls for the following day and was also unable to find that any judgment or order had been entered



in the case; that he went into court on the following morning to ascertain when the case was to be called for trial and then learned that a judgment had been entered on the previous day, although many of the cases which preceded the case at bar were still being carried on that day; that he had no notice of any motion to advance the case and that no motion had been entered advancing it for trial.

The affidavit then contained a number of allegations all of which had to do with the defendant's claim that he had a meritorious defense to the plaintiff's cause of action. In this connection the defendant set forth in his affidavit that he had been the owner of a \$1800 mortgage made by one Howell; that he offered this mortgage for sale, as he was in need of funds and that one Gettert advised him he had a purchaser who would buy it; that he then transferred and delivered the mortgage to Gettert and received a check therefor; that on the next semi-annual interest day Gettert came to defendant's office with the plaintiff, introducing her as the purchaser of the Howell mortgage; that as a favor to Gettert and at his request, defendant collected the interest and remitted it to the plaintiff, without any charge for his services; that the relationship of attorney and client never existed between the plaintiff and the defendant. The affidavit further set forth that the Howell mortgage was not paid at its maturity and the plaintiff claimed that it had been guaranteed by defendant which the latter denied; that the plaintiff then requested the defendant to purchase the mortgage from her or give her another mortgage in exchange; that the defendant saw Howell who said he could not pay the mortgage; that the defendant offered to take the Howell mortgage from the plaintiff and give her in exchange a mortgage

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of \$1,000 on some vacant property in Morgan Park and a second mortgage on the Howell property, for \$500, which offer she accepted; that the defendant then had Howell convey his property, for a small consideration, to Miss Kren, the defendant's stenographer, defendant agreeing to assume the mortgage; that defendant conveyed his property in Morgan Park to his stenographer Miss Kren, who then executed a first mortgage on the Howell property for \$1,300 and also the other mortgages agreed upon; that when defendant delivered the second mortgage for \$500 on the Howell property and the \$1,000 mortgage on the Morgan Park property to plaintiff she asked who Miss Kren was and defendant told her who she was and explained that she held title only for his use and benefit, whereupon she asked defendant for some writing to show that he would be responsible on the said notes and mortgages and that he thereupon executed such a document and delivered it to plaintiff together with the mortgage papers and, in exchange, received from her the Howell mortgage papers. The balance of the affidavit had to do with interest payments and also certain payments which had been made on the principal of the second mortgage by the defendant.

The motion to vacate the judgment was addressed to the sound discretion of the trial court and from all the facts shown by the record, which we have outlined, we cannot say that there was any abuse of that discretion. If, on the day the case at bar was reached on the trial call, the cases preceding it went over to the next day for one reason or another and, when the case at bar was reached, plaintiff was present and ready for trial and defendant was not present, either personally or by counsel and had not advised the trial court of his engage-





ment in another court, the plaintiff had a right to present her evidence and ask for such a judgment as it warranted. The plaintiff also had the right to disallow her suit against Miss Kren. It appears that defendant's court engagement on January 23, did not continue beyond the forenoon and it does not appear what time on that day the judgment appealed from was entered.

We shall next consider the matter urged by the defendant in support of his appeal from the judgment itself. It is contended that plaintiff's charge of conspiracy and collusion between the defendant and Miss Kren must necessarily have failed of competent proof, because of the dismissal of the case as to Miss Kren, after which no evidence would be admissible as to any conspiracy, being a variance from the declaration, which was not amended. That contention cannot prevail for two reasons. First, there is no evidence preserved in this record and necessarily no objections were preserved to any of the evidence that was offered. Second, even though there was no amendment of the declaration after the action was dismissed as to Miss Kren, the plaintiff might properly introduce evidence tending to prove the charge of fraud laid in the declaration as against the defendant. Like the recent case of Hymas v. Hurmeister, Illinois Appellate Court, First District, case No. 24867, opinion filed December 3, 1919, not yet reported; the case at bar was an action in tor. As we said in that case, "In an action on the case in the nature of a conspiracy, the judgment may be against a single defendant without proof of the conspiracy. The gist of such an action is not the conspiracy alleged, but the tor committed against the plaintiff, and the damage suffered by him as a result of such tor. When the tor committed and the



damage resulting therefrom proceed from a series of concerted acts, the averment that they were done by several in pursuance of a conspiracy does not so change the nature of the action, that if the wrongful acts are shown to have been done by one only, it cannot be maintained against him alone, and the other defendants exonerated."

The defendant refers to other matters which he contends were lacking so far as allegations in the declaration are concerned and that, not being averred, they cannot be considered as having been proven. In the state of this record, with none of the evidence before us, we must presume that the evidence was sufficient to support the verdict and judgment and further, the declaration is quite sufficient to support the judgment, after verdict. What we have already said, dispenses of objections raised by the defendant to certain instructions. The defendant also contends that the court erred in the giving of certain instructions on the subject of fraud. We have carefully examined them all and in our opinion the defendant's contentions are not tenable.

We find no error in the record and therefore the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.





232 - 26004

WILLIAM KANNER,

Appellee.

vs.

C. H. MORGAN GROCERY COMPANY,  
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 661

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$3,500 in favor of the plaintiff, Kanner, against the defendant, appellee, for damages resulting from a collision between a light delivery auto-truck belonging to appellant and a bicycle on which appellee was riding. The place of the accident was in Chicago, at the intersection of Langley avenue, running north and south, and 43rd street, running east and west. On the latter street was a street car line. The collision was about where the east cross walk of Langley avenue crosses the south or east bound tracks of the car line. The automobile struck the rear wheel of the bicycle.

There was a conflict of evidence as to the direction appellee was riding. The driver of the truck and two of defendant's witnesses testified that he was riding his bicycle west behind a west bound car and turned from its rear into the east bound track just before the collision. Appellee testified that after making a business call at an apartment building on the southwest corner of Langley avenue and 43rd street, he left by its entrance, which was about 45 feet south of the south line of 43rd street, mounted his bicycle at the curb opposite the entrance, and proceeded slowly towards the southeast corner of the street intersection and thence north to the point of collision; that he looked first to the west for about one quarter



of a block and then east but saw no vehicle approaching. His inability to see the truck within a quarter of a block is not inconsistent with testimony by others as to the direction he took and the speed with which the automobile was driven. That he was in that building just prior to the accident was testified to by the person he visited, and another occupant of the apartment saw him leave the apartment building, get on his bicycle and drive it northeasterly towards 43rd street immediately before the accident. Another witness on the opposite side of 43rd street saw him coming north on Langley avenue. Other evidence also tended to establish the fact that he was driving his wheel north on Langley avenue, and not west on 43rd street. As to the direction and course taken by appellee, we think the jury were amply justified in accepting his version.

With that conclusion, we cannot regard the verdict as against the preponderance of the evidence on either the question of negligence or contributory negligence. For plaintiff unquestionably had an equal right to the street, was on the proper side of it, had evidently entered the intersection with due caution and well ahead of the automobile with nothing to obstruct the driver's view of him; and had the driver of the truck been driving at the rate of speed the law and ordinary care required him to observe in such a place the accident would probably not have happened. Taking this view of the evidence we see no special reason for a more detailed analysis of it.

There was a count for wanton and wilful negligence. Defendant asked for instructions to the effect that there was no evidence to sustain said count, and assigns error in the refusal to give such instructions. There were stores on both sides of 43rd street at the corners of the intersection. At such a place it was prima facie negligence to drive at a speed of 15





miles an hour. From the testimony appellee was in plain view of the driver of the truck and had got part way across 43rd street before the automobile had reached the intersection, and there was evidence tending to show that the car was running at the rate of 30 miles an hour and did not slack its speed. Under such circumstances we think it was a question of fact for the jury to decide whether or not the driver was not guilty of wanton and wilful negligence, and, therefore, the instructions were properly refused. (People v. Falkovitch, 280 Ill., 321.)

Complaint is made of one of plaintiff's instructions which told the jury in effect that if they believed that defendant was guilty of wilful and wanton negligence they might give exemplary damages. It is urged that the instruction failed to tell the jury that they must find such fact by a preponderance of the evidence. They were told in other instructions given at defendant's request that the burden was upon plaintiff to prove such element of damage claimed by the greater weight of the evidence. We do not think, therefore, that they were misled by the omission claimed, and in fact the instruction in that form has been approved in several cases. (Footo v. Nichols, 28 Ill., 426; The Chicago Consolidated Traction Co. v. Mahoney, 230 Ill., 562; O'Leary v. Mindt, 109 Ill. App., 309; Chicago & Eastern Illinois R. R. Co. v. Cleminger, 77 Ill. App., 186; 178 Ill., 536.) Besides, there is no complaint that the damages assessed would be excessive, even without the issue of wilfulness. Finding no good reason for reversing the judgment we will affirm the same.

AFFIRMED.

Gridley and Matchett, JJ., concur.



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258 - 20030

ADOLPH BENDER, Appellant,

vs.

JACOB SHAFER and JOSEPH  
C. KLEIN, Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 661

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

In this suit plaintiff, Bender, replevied certain fixtures and personal property in a delicatessen store owned by defendant Shafer, and occupied at the time by defendant Klein as a tenant under said Shafer. The basis of plaintiff's claim to possession and title of said property is a bill of sale to <sup>him from</sup> one Lipschutz, who was the last tenant of the premises before Klein. There was an attempt to show by an unsigned bill of sale from a tenant by the name of Thomson, whom Lipschutz succeeded, that the latter obtained title to said property from the former. Such proof, however, was utterly incompetent for that purpose, and there was no proof to show that Lipschutz had any right or title to such property to convey, or that plaintiff had any right to possession thereof when the suit was brought.

The controlling facts are these: Shafer bought the building from one Frevus in 1912. At that time a Mrs. Shelly occupied the premises as a tenant of Frevus, and used them as a delicatessen store. They continued to be so used up to the time of plaintiff's alleged purchase of the fixtures, which were in the building at the time of Shafer's purchase, which included the fixtures and personal property on the premises.



When Mrs. Skelly vacated the premises she left said fixtures and personal property therein. Shafer rented the premises successively to one Sanders, one Graff, said Thomson, one Wodes, another Thomson, and said Lipschultz. All this time the fixtures and personal property remained in the store and were used as a part thereof or in connection with the delicatessen business.

While most of said property was in some manner attached to the building by nails, screws or other attachments it is unnecessary to consider whether they were actually fixtures, there being insufficient evidence to sustain the replevin writ even on the theory that all the property taken was personal property.

Sander purchased the property of Lipschultz, who vacated the store before the termination of his lease. There was a conflict of evidence as to whether Sander was to remain in the premises until Shafer procured another tenant, but the fact is immaterial if the title to the property was actually in Shafer. On again taking possession of the premises Shafer rented the same to defendant Klein, and while the latter was in possession the property in question was taken by said replevin writ. There was no preponderance of evidence to support plaintiff's claim or title to the property or right to the possession thereof, and, therefore, the judgment of the court finding the title to the property was not in the plaintiff and that it should be returned to the defendants, was proper, and will be affirmed.

The judgment from which this appeal is prayed was entered January 31, 1920, and 60 days were given in which to prepare a bill of exceptions. A few days subsequently plaintiff moved to have the judgment vacated, presenting in support thereof

It is important to note that the above results are based on the assumption that the data are normally distributed. If the data are not normally distributed, the results may be biased. Therefore, it is important to check the normality of the data before using the above methods.



certain affidavits tending to show newly discovered evidence. The motion was denied. From each ruling the defendant prayed another appeal, and was given 60 days in which to file a bill of exceptions. The parties stipulated that the appeal from the later order might be considered and reviewed by this court in connection with the appeal from the judgment, and the court undertook to enter an order to the same effect based on such stipulation.

Appellees have moved to expunge this part of the bill of exceptions as not properly a part of the bill of exceptions in connection with this appeal. We think the motion should be granted. No appeal was perfected from the final order denying the motion to vacate the judgment. It is evident the parties could not make an appeal by stipulation and thereby confer jurisdiction upon this court. Appeals are statutory and the statute with regard thereto must be complied with. The judgment will be affirmed and the motion to expunge allowed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.



265 - 26037

J. T. BLOCH,

Appellee.

vs.

MRS. ELIZABETH S. STEINBERG,

Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

221 I.A. 662

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This suit was brought in replevin. The return of the writ showing service on appellant and her refusal to deliver the property, a statement of claim in trover was filed by leave of court. It charged delivery by appellee, the plaintiff, to appellant of certain described jewelry on condition that she would marry him, his subsequent demand on her for the jewelry, and that it was worth \$1,000. Issue was taken in defendant's affidavit of merits on each of these averments.

The evidence is very conflicting and unsatisfactory, but in the view we take of the case it is unnecessary to discuss it. The court's finding was for plaintiff and his damages were assessed at \$1,000.

The only proof of the value of the jewelry was in plaintiff's testimony that it was "worth about \$1,000." Defendant's motion to strike such evidence was denied, but, we think, should have been granted. It is insufficient evidence of value on which to assess damages and base the judgment.

Appellee contends that even if it was incompetent evidence yet the value stated in plaintiff's affidavit of replevin is prima facie evidence thereof. In every case wherein the courts have so held, that has been brought to our attention, the ruling was against



sureties on the relievin bond in an action thereon, on the theory of estoppel based on the recitals in the affidavit, writ and bond. But we are aware of no ruling where in a case in trover plaintiff, upon whom the burden of proving the amount of damages when put in issue rests, has been permitted to treat his own declarations as evidence thereof.

Furthermore, the form of the judgment is unauthorized, which was that the defendant "was guilty of having maliciously, wilfully and intentionally, and with intent to injure and defraud the plaintiff converted to defendant's own use, the property of the plaintiff," etc. There was no charge in the statement of claim and no proof to justify such a finding. Neither malice nor fraud was an issue in the cause. The court having based its judgment upon incompetent evidence of value, and the form of the judgment not being justified by the pleadings or proof, the case will be sent back for a new trial.

REVERSED AND REMANDED.

Gridley and Hatchett, JJ., concur.





277 - 26049

FRANK MILKE,  
Appellee,

vs.

BOYLE ICE COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 662

MR. PRESIDING JUSTICE BARNES  
DELIVERED THE OPINION OF THE COURT.

In this case plaintiff, appellee, sued for \$61.50 due as wages from defendant appellant. The latter filed an affidavit of merits setting up that while plaintiff was so employed and in charge of one of defendant's wagons as a teamster, he negligently ran the team and wagon against an automobile of a third party, causing damage, which was adjusted at \$61.50, a sum that was less than the usual, reasonable and customary charge for such repairs, and offered to set off the same against plaintiff's demand. On plaintiff's motion this affidavit was, in our judgment erroneously stricken. Under the doctrine laid down in Stowe v. Harwood, 16 Ill. 444, defendant was entitled to recoup, the court there holding that it is not necessary that the opposing claims should be of the same character, citing cases where the action was in form ex delicto and the claims allowed in defense arose ex contractu. The court said: "It is sufficient that the counterclaims arose out of the same subject matter, and that they are susceptible of adjustment in one action." Such is the fact in the case at bar. The suit and damages defendant sought to recoup grew out of the relation of master and servant. As therefore the affidavit set forth proper grounds for recoupment it was error to strike the same and



enter judgment as in case of default. Nor is there anything in the rules of the court set forth in the record which justified such procedure.

REVERSED AND REMANDED.

Gridley and Hackett, JJ., concur.





26801  
143 - 26801

LAVIN ROOFING COMPANY,  
a corporation,

Appelles,

vs.

J. C. MCCARTNEY et al.,

J. C. MCCARTNEY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2211A. 662

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

In this case the judgment appealed from was entered January 14, 1921, and appellant was allowed 60 days for filing a bill of exceptions. On March 12th the time was extended to April 1st, and on April 2nd to April 15th, by stipulation of the parties. The document was presented and signed April 12th.

No order for extension of the time within which to file the bill of exceptions was entered within 30 days after the judgment, after which time without an order within such 30 days, the Municipal Court had no power to extend the time. (Lassers v. North German Lloyd Steamship Co., 244 Ill., 970) and the Supreme Court has held that the provision of the Municipal Court Act so limiting the court's power cannot be waived by stipulation. (Warlitzer Co. v. Dickinson, 247 Ill., 27; Haines v. Banderine Co., 248 Ill., 259.)

Accordingly we must grant appellee's motion to strike the bill of exceptions from the transcript of the record, and also his motion to affirm the judgment as the only assignments of error argued by appellant relate to that part of the record so stricken.

AFFIRMED.

Gridley and Morrill, JJ., concur.



217 - 25989

LORENZO J. LAMSON, WARREN A.  
LAMSON and LESLIE F. GATES,  
copartners as LAMSON BROS.  
& CO.,

Appellants,

vs.

FRANK GREINER,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

221 I.A. 662

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 27, 1913, plaintiffs, members of the Chicago Board of Trade and brokers and dealers in grain, pork and other commodities in Chicago, commenced an action in assumpsit in the Superior Court of Cook County against defendant, a resident of Richland, Iowa. On the same day plaintiffs sued out an attachment in aid on the ground of the non-residence of defendant and subsequently filed a declaration, consisting of three special counts and the common counts, together with copies of the instruments and of the account sued on. Plaintiffs claimed that defendant was indebted to them in the total sum of \$4986.25, itemized as follows: Defendant's note for \$3000, dated May 17, 1912, payable on or before one year after date, with interest at 6% per annum after date; his check for \$500 dated October 9, 1912; his check for \$750 dated October 11, 1912, accrued interest on said note and checks amounting to \$285; and an open account for monies expended by plaintiffs for defendant's use and benefit at various times between August 27, 1912, and November 20, 1912, in the aggregate sum of \$451.25. Defendant entered his appearance and filed a plea of the general issue and several special pleas, to which plaintiffs filed replications. By agreement the cause was submitted to the court for trial without a jury, resulting in a finding of the attachment

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January 10, 1941  
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ON THE  
REVENUE  
FOR THE  
FISCAL YEAR  
ENDING  
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PUBLISHED BY THE  
UNITED STATES GOVERNMENT  
WASHINGTON, D. C.  
1941



issue in favor of plaintiffs, but in a finding of the assumpsit issues in favor of defendant. On October 6, 1919, the court entered judgment against plaintiffs for costs and this appeal followed.

On the trial it was admitted that defendant had executed and delivered the unpaid note and that defendant's two checks had been duly presented to the bank on which they were drawn and that payment had been refused. The sole issue raised in the pleadings, and upon which the case was tried, was, as stated by counsel for plaintiffs in their printed brief and argument here filed, "whether the notes and checks sued on had been given in settlement of losses sustained in gambling transactions." It is provided in section 130 of the Criminal Code:

"Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, \* \* where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof, \* \* shall be fined not less than \$10 or more than \$1000, or confined in the county jail not exceeding one year or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

And it is provided in substance in section 131 of said Code that all notes, bills, mortgages, or other securities or conveyances made, etc., by any person whatsoever, where the whole or any part of the consideration thereof shall be for money, property or other valuable thing won by any gambling, etc., shall be void and of no effect.

The rules of law to be applied to cases of this character are well settled. In order to invalidate a contract under the statute it must appear that neither party had the intention to deliver the property but that both had the intention of settling on the differences only. (Jamieson v. Wallace, 167



There is a great deal of interest in the fact that the  
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Ill., 369, 396; First National Bank v. Miller, 235 Ill., 136, 140; Hartwig v. Booth, 217 Ill. App., 70, 74.) And this intention may be established, not only by their assertions, but from the nature of the transactions, the method of carrying on the business and by all the attending circumstances, and the question of intention is one for the jury or the court on a consideration of all the evidence. (Jamison v. Wallace, supra; First National Bank v. Miller, supra; Hartwig v. Booth, supra; Pratt & Co. v. Ashmore, 224 Ill., 587, 591.) "If it is the purpose and the intent of one party to use the legitimate forms of trading on the Board of Trade for the purpose of putting over an illegal transaction, and the other party knowing this lends his assistance in carrying out the purpose, the parties are accomplices in crime." (Hartwig v. Booth, 217 Ill. App., 70, 75; Lanson v. East, 201 Ill. App., 251, 255; Pope v. Hanke, 156 Ill. 617, 623; Seare Commission Co. v. People, 209 Ill., 528, 542.) Under the provisions of section 131 of the Criminal Code it has been held that no recovery can be had on notes or drafts given or assigned where the consideration of which in whole or in part arises out of gambling transactions mentioned in section 130 of said Code. (Pope v. Hanke, 156 Ill., 617, 629, and cases there cited.) And in Lanson v. East, 201 Ill. App., 251, 257, it is said: "When a broker engages to assist his client in committing the crime of gambling, he cannot recover from such client for his services or for losses incurred by himself on behalf of such client in forwarding the transaction."

On the trial of the present case the defendant was a witness in his own behalf and he called as witnesses William B. Massey, chief clerk of plaintiffs in Chicago and having general supervision of their books and accounts, and Walter Hardyke, residing in Dubuq, Iowa, and engaged in the business of farming and buying and selling hogs and cattle. Plaintiffs, in rebuttal, called as witnesses Leslie W. Gates, one of plaintiffs' firm in



Chicago, and Harry L. Kaga, plaintiffs' representative at Washington, Iowa. Certain documentary evidence also was introduced.

The evidence introduced by defendant tended to show that in the year 1912 defendant owned and was operating a farm of 320 acres near Michland, Iowa, and about 18 miles from Washington, Iowa, raising grains, hogs, cattle and sheep; that prior to March, 1912, he had never traded in any commodities on the Chicago Board of Trade; that in March 1912 he met Wordyke who suggested that he buy some pork on the Chicago Board of Trade through Kaga as representative of plaintiffs' firm; that a few days thereafter he and Wordyke called on Kaga at the latter's office in Washington, Iowa, and as a result of the interview he on March 29, 1912, placed his first order with plaintiffs through Kaga, to buy for him 500 barrels of pork for September delivery and paid over certain monies as margins; that on April 4, 1912, he in the same manner purchased 500 more barrels of pork, and on April 5th he purchased 50,000 pounds of ribs for July delivery; that on April 12th and 13th he sold out all of said pork and ribs; that between April 18, and November 19, 1912, he bought and sold, through plaintiffs as brokers, large quantities of various commodities, pork, ribs, lard, wheat, oats and corn for future deliveries, aggregating in value many thousands of dollars; that during said period he made more than one hundred separate purchases of commodities and the same number of separate sales; that in some instances purchases and sales of particular commodities were made on the same day; that no deliveries of any of the commodities were made or tendered by either party, but all trades were closed before the delivery dates; and that all trades, such as were settled, were settled on the basis of the differences between what the particular commodities were purchased for and







what they were sold for. Defendant testified in substance that in one of his first interviews with Kaga the latter told him that he could make money easier on the Board of Trade than he could by farming, and that all it was necessary for him to do was "to just keep up the margins;" that he had many interviews with Kaga during the month of April, 1918, during which he discussed with Kaga the buying or selling of various commodities and that sometimes Kaga would say, "Buy this or buy that, that looked good to him;" and that at one of these interviews, at which Nerdyke was present, the question of possible deliveries of commodities purchased or to be purchased was discussed and that Kaga said, "You don't need to worry any about that, boys, - about any deliveries." Nerdyke testified in substance that he was with defendant in Kaga's office on several occasions, that he once heard Kaga say that "there was no deliveries to be contemplated," and that on another occasion in defendant's presence, "Kaga explained that, that you could take the stuff and not sell it, not have to deliver, for you could buy it in, or you could buy it, and you could sell it again and not have to deliver it." Kaga, in rebuttal, testified in substance that he never had any conversation with defendant or with Nerdyke in which he told either of them in effect that they "would not have to take deliveries in the case of purchases or make deliveries in the case of sales." He further testified that in March, 1918, he was, and had been for about one year, plaintiffs' representative in Washington, Iowa; that in his office he had a private telegraph wire which was connected with plaintiffs' general office in Chicago, and which he used in connection with the brokerage business which he transacted for them; that at that time he had about 75 or 80 customers who were dealing in the purchase or sale of "futures"; and that each customer had a number, de-



defendant's number being 22. Because of convenience of transmitting orders by wire. Defendant further testified in substance that, in May, 1912, after he had lost about \$6000 in the various trades made through Kaga and plaintiffs' claimed he owed them about \$2400. He decided to stop trading and so notified Kaga; that the latter came to him farm and urged him to continue making trades and said that he (Kaga) would make up his (defendant's) losses in new trades provided defendant would furnish the money; and that finally defendant consented to make further trades and he executed and delivered the \$3000 note sued on to Kaga at Washington, Iowa, of which amount \$600 was to apply as margin money on new trades.

In view of the evidence as above outlined, particularly the testimony of defendant's witnesses as to the statements made by Kaga to defendant regarding deliveries, and in view of all the other facts and circumstances disclosed in the present record, we think that the trial court was fully justified in finding the assumpsit issues against the plaintiffs and in entering the judgment appealed from. The entire evidence tended strongly to show that each and all of the purchases and sales of the commodities made by defendant were made with the intention on the part of both parties hereto that there should be no deliveries of said commodities, and that the losses and profits on the several transactions should be determined by the difference between the market price of said commodities at the time a particular trade or transaction was opened and at the time it was closed, and that, hence, under the provisions of said section 130 of said Criminal Code and the decisions of the courts of review of this state above cited, said transactions were gambling transactions, and plaintiffs were not entitled to recover on the note, checks or the open account sued on.



Accordingly, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Hatchett, J., concurs.

MR. PRESIDING JUSTICE BARNES SPECIALLY CONCURRING:

I concur in affirming the judgment on the ground that plaintiffs should be bound by the statements of their agent, Kaga, made to defendant in the course of the transactions, to the effect that no deliveries of commodities were contemplated or payments of the full purchase price required, but that the transactions would be conducted on the basis of adjusting differences in market prices, and that it was upon such statements and mutual understandings that defendant was induced to make the trades.



# THE HISTORY OF THE CITY OF BOSTON

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

1780

BY JAMES OSGOOD

THE HISTORY OF THE CITY OF BOSTON, FROM THE FIRST SETTLEMENT TO THE PRESENT TIME, BY JAMES OSGOOD, ESQ. VOL. I.

THE HISTORY OF THE CITY OF BOSTON, FROM THE FIRST SETTLEMENT TO THE PRESENT TIME, BY JAMES OSGOOD, ESQ. VOL. I. THE FIRST PART, FROM THE FIRST SETTLEMENT TO THE YEAR 1630. THE SECOND PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE THIRD PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE FOURTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE FIFTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE SIXTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE SEVENTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE EIGHTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE NINTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME. THE TENTH PART, FROM THE YEAR 1630 TO THE PRESENT TIME.

NEW-YORK: PUBLISHED BY J. B. ALLEN, 1830.

LEWIS A. WEYBURN, Appellant,

vs.

JOHN A. GODFREY, administrator  
of the estate of IDA L. PLACE,  
deceased, et al., Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

221 I.A. 662

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal of Lewis A. Weyburn, complainant and one of the defendants to the cross-bill of John A. Godfrey, administrator of the estate of Ida L. Place, deceased, from a decree of the Circuit Court of Cook County, entered December 23, 1919, dismissing complainant's bill for want of equity and granting affirmative relief on said cross-bill by ordering the defendants Henshaw, Stodder and Kennedy, surviving trustees of the Chicago-Auburn Park Land Trust, (hereinafter called the land trust) to pay said Godfrey, as administrator, the principal sum of \$3000 (being certain unpaid distributions in the hands of said trustees to the credit of 4000 shares in said land trust standing in the name of Ida L. Place) and the further sum of \$320.50, accrued interest on said principal sum at the rate of 3 per cent per annum from June, 1916, to the date of the decree, and further ordering that complainant and said trustees pay the master's fees and costs.

The bill is a creditor's bill filed January 12, 1917, under section 49 of the Chancery Act. By it complainant, as assignee of certain allowed and unpaid claims against the estate of Doctor E. Place, deceased, the husband of said Ida L. Place, sought to subject said distributions in the hands of said trustees to the payment of said claims. The bill charged in

1880 - 1881

1882 - 1883

1884

1885 - 1886

1887 - 1888

1889 - 1890

1891 - 1892

The following table shows the results of the various experiments conducted during the year 1891-1892. The first column gives the date of the experiment, the second column the name of the person who conducted it, and the third column the result. The results are given in the form of a percentage of the total number of experiments conducted. The first column gives the date of the experiment, the second column the name of the person who conducted it, and the third column the result. The results are given in the form of a percentage of the total number of experiments conducted.

substance that the assignment of said shares in the land trust on November 23, 1897, to Mrs. Place by Doctor E. Place, prior to the death of either, was in fraud of creditors of the latter because made without consideration and because he was insolvent at the time, and that there were no assets of his estate out of which said claims could be paid except said unpaid distributions. Godfrey, as administrator, the trustees of the land trust (including Samuel Kerr, an attorney at law, and who was then alive) and others, were made parties defendant to the bill. Samuel Kerr was made a party both individually and as trustee. All of the defendants filed answers. Godfrey, as administrator, in his answer denied that, at the time the said assignment of said shares was made to Mrs. Place on November 23, 1897, or at the time of his death on February 13, 1898, said Doctor E. Place was insolvent, or that his estate was insolvent; alleged the continuous possession by Mrs. Place of the certificates representing the shares involved from November 23, 1897, to the date of her death on January 23, 1916; alleged that on November 23, 1897, Doctor E. Place was indebted to Mrs. Place in a large sum and that said assignment was made in part payment of that indebtedness; and alleged that Mrs. Place had been paid certain of the distributive shares due on said certificates. In his cross-bill, Godfrey, as administrator, made similar allegations as to the solvency of Doctor E. Place and the solvency of his estate, and further alleged in substance that Heyburn was merely the nominal complainant and said Samuel Kerr the real complainant and real owner of the claims against the estate of Doctor E. Place, deceased, and that said Samuel Kerr was guilty of fraud in the administration of said Place's estate, while he was acting as attorney for Mrs. Place as executrix thereof; and prayed that an account be taken and that the trustees of

The first of these is the fact that the population of the United States has increased rapidly since 1850. This is due to a number of causes, including immigration, a high birth rate, and a low death rate. The second is the fact that the population is becoming more concentrated in the eastern half of the country. This is due to the fact that the eastern half of the country has a more favorable climate, a more fertile soil, and a more developed industry. The third is the fact that the population is becoming more educated. This is due to the fact that the United States has a high literacy rate, and that the population is becoming more aware of the importance of education. The fourth is the fact that the population is becoming more mobile. This is due to the fact that the United States has a large area of free land, and that the population is becoming more aware of the opportunities that this land offers. The fifth is the fact that the population is becoming more diverse. This is due to the fact that the United States has a large number of immigrants from different parts of the world, and that the population is becoming more aware of the value of diversity.



the land trust be decreed to pay the funds to him as administrator, and that complainant's bill be dismissed. All the parties made defendants to the cross-bill filed answers thereto and complainant denied all the material allegations thereof.

The cause was referred to a master in chancery where much evidence, oral and documentary, was heard. In his somewhat lengthy report, submitted on April 23, 1919, the master made many findings contained in 65 paragraphs, and he reached the following conclusions in substance: (1) That Doctor S. Place was insolvent when he transferred the certificates for certain shares in the land trust to Mrs. Place on November 23, 1897; (2) that all or nearly all of the claims, on which this suit is brought, were valid, existing obligations at the time of said transfer; (3) that in deciding the questions raised in this record Samuel Kerr must be considered to be the real and only complainant; (4) that, in a suit brought in apt time by the original creditors, or their assignee other than Samuel Kerr, it may well be that the transfer and assignment from Place to his wife should be held void and the moneys due on the shares then transferred should be applied to the payment of said claims; (5) that Samuel Kerr occupied the confidential relation of attorney to Mr. Place in his lifetime, and to Mrs. Place, after his death, as executrix and individually, and he cannot be allowed to bring claims against the estate of Mrs. Place and subject the shares and the monies due on them to the payment of such claims, under the circumstances shown in this record, and he cannot be allowed to insist that this property or any part of it belonged in fact to the estate of Mr. Place; (6) that said Samuel Kerr (who is the only person now beneficially interested in said claims assigned to the nominal complainant, Weyburn) is estopped by his conduct shown in this record to claim that the shares held by Mrs. Place and the monies due on them



were not her absolute property, and that for the purposes of this suit said shares and the monies due on them must be held to have been her absolute property at the time of her death, and not assets of her husband's estate; and (7) that, if the statute of limitations is not well pleaded to the bill of complainant, owing to the fact that Mrs. Place was a non-resident, still Samuel Kerr is chargeable with such laches and acquiescence in admitting the ownership in Mrs. Place of said shares, and the monies due thereon, that he cannot be heard now to claim that said property does not belong to her estate. The master recommended that the bill of complaint be dismissed for want of equity, and that a decree be entered requiring the trustees to turn over to the cross-complainant, Godfrey, as administrator, the principal sum represented by the certificate of deposit for \$3000 of the Northern Trust Company, and all interest paid or due thereon from said bank, free and clear from any claim or claims of any of the defendants to the cross-bill.

Objections were presented to the master's report by the complainant and cross-defendant Heyburn, and by the defendant, James F. Bishop, administrator be bonis non with the will annexed of the estate of Doctor J. Place, deceased, and by the defendant and cross-complainant, Godfrey, as administrator. All objections were overruled, except two certain objections of Heyburn, complainant, which were sustained, and the master's report amplified on its face accordingly. The master's report was filed in the Circuit Court on May 22, 1919, and it was ordered that all objections there stand as exceptions. On November 15, 1919, the court ordered that the certificate of deposit, issued by the Northern Trust Company be brought into court instantly by the defendants, the trustees of the land trust, that the same be





endorsed by them and deposited with and retained by said trust company until the further order of the court. During November, 1919, Samuel Kerr died.

On December 23, 1919, after a full hearing on said exceptions the decree appealed from was entered. In the decree the court found that the issues were with the defendant and cross-complainant, Godfrey, administrator, etc., and that the exceptions filed by the complainant, Heyburn, to the master's report were not sustained by the evidence or well founded in law, and ordered and decreed that all of said exceptions be overruled and that Heyburn's bill of complaint be dismissed for want of equity; and the court sustained certain exceptions to the master's report filed by the cross-complainant, Godfrey, administrator, etc., in substance (1) that the finding of the master, to the effect that at the time of his death Doctor H. Place was insolvent, was contrary to the evidence, and that the conclusion of the master that because of such insolvency the assignment of the shares in the land trust by Doctor H. Place to his wife was fraudulent as to creditors, was contrary to the law; (2) that the finding of the master, to the effect that at the time of said assignment Doctor H. Place was insolvent, was contrary to the evidence, and that the conclusion of the master, that because of such insolvency said assignment was fraudulent as to the creditors of Doctor H. Place, was contrary to the law; and (3) that the finding of the master, to the effect that said assignment was without consideration and void as to creditors who had claims against Doctor H. Place at the time of the assignment, was contrary to the facts and the law; and the court further found from all the evidence that, on November 23, 1897, when he made said assignment to his wife, Doctor H. Place was solvent, and that said solvency continued up to the time of his death.





and that, at the time his will was admitted to probate in the Probate Court of Cook County (March 21, 1898), the estate of Doctor S. Place was a solvent estate; and the court overruled all the exceptions filed by the defendant, James W. Bishop, as administrator de bonis non with will annexed of the estate of Doctor S. Place, deceased, to the master's report; and the court further found from all the evidence that all the findings of fact made and reported by the master were true, excepting such thereof as stated that Doctor S. Place was insolvent in the month of November, 1897, and that all of the conclusions of the master (the 1st and 4th thereof excepted) were well supported by the evidence and well founded in law, and the court sustained the master's report except as above mentioned; and the court further found that said defendants, the surviving trustees of the land trust, were justly indebted to Godfrey, as administrator, etc., in the sum of \$3000, with interest, etc., and ordered and decreed that said trustees make the payments as first above mentioned in this opinion, and further ordered and decreed that, the death of Samuel Herr having been suggested of record, the cause be discontinued as to him, individually and as one of the trustees of the land trust.

The principal point urged by counsel for appellant, as a ground for a reversal of the decree, is that the evidence does not sustain the court's finding of fact (which was contrary to that of the master) that, on November 23, 1897, when Doctor S. Place assigned the shares in question to his wife, Ida L. Place, he was solvent. Counsel in his printed reply brief regards the question, as to whether Doctor S. Place was solvent or insolvent at that time, as the crucial one in the case. No useful purpose, however, will be served in hectoring upon a discussion of the evidence bearing upon this question. Suffice it to say that



after careful consideration of the facts and circumstances in evidence we are of the opinion that at the date of said assignment and up to the time of his death Doctor S. Place was solvent, and was not guilty of any fraud upon creditors in making said assignment. And we think, under all the facts and circumstances in evidence, that the master's 5th conclusion above mentioned, which was sustained by the court, was proper and affords an additional reason why the court properly dismissed complainant's bill for want of equity and entered the decree appealed from upon the cross-bill.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Barnes, F. J., and Hatchett, J., concur.





268 - 26040

FOOTE CONCRETE MACHINERY  
COMPANY, a corporation,  
Appellee,

vs.

GUSTAV C. ANDERS,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

221 I.A. 663

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 30, 1919, plaintiff, as endorsee and holder of a promissory note for value before maturity, brought a fourth class action in the Municipal Court of Chicago against the defendant, as maker, to recover the amount of the note and interest. The note is for \$500, dated March 17, 1919, payable to the order of C. C. Dawson 90 days after date, with interest at 6% per annum after maturity, and is endorsed in blank by said Dawson. Defendant filed an affidavit of merits in which he denied that said note was endorsed to plaintiff for value and before maturity, and alleged that the same was endorsed without any consideration and with notice of defendant's set-off and counterclaim. Defendant on the same day filed a statement of claim of set off in which he alleged that on or about October 1, 1918, he loaned to said C. C. Dawson as an accommodation, and the latter borrowed of him, his Chandler automobile, reasonably worth \$1500; that while said Dawson was using said automobile as a gratuitous bailee he failed to take proper care thereof, neglected to lock the same while not in use, left the same unguarded for the period of about one hour at the corner of Madison and Market streets in the city of Chicago, and thereby negligently permitted the same to be stolen; and that in consequence thereof the then value of the automobile, to-wit, \$1500,

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was lost to defendant and he hereby effects the said sum against plaintiff's claim.

On the issues thus made the case was called for trial on October 14, 1919, before the court without a jury, and, after hearing evidence introduced by both parties and after both sides had rested, the court took the case under advisement. On October 27, 1919, thirteen days afterwards, the defendant appeared and asked leave to file an amended affidavit of merits, which motion was granted and the same was filed instantly. In this amended affidavit, after repeating the allegations contained in the former affidavit and after setting forth the facts as stated in its claim of set off, defendant further alleged that "plaintiff corporation was not authorized by its charter to acquire the promissory note sued on; that the acquiring of the same was an act of ultra vires and void." Defendant's attorney then offered in evidence the charter of the plaintiff corporation, but the court refused to allow the same in evidence. Said charter, which is contained in the bill of exceptions, disclosed that plaintiff was duly licensed as a corporation under the general incorporation law of Illinois on August 26, 1908, and that the object for which it was formed was "manufacturing, buying and selling machinery." The court thereupon, on October 27, 1919, found the issues against the defendant and assessed plaintiff's damages at the sum of \$510, and entered judgment for said sum against defendant and this appeal followed.

It appears from the evidence that defendant executed and delivered the note to Dawson on March 17, 1919, the day of its date; and that two days thereafter, on March 19, 1919, and before its maturity, Dawson, for full value received from plaintiff, endorsed and delivered the note to plaintiff. The court

THE UNIVERSITY OF CHICAGO

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom regarding the treatment of the British Commonwealth.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

It is believed that the following information is correct:



allowed the defendant to testify to the effect that sometime during the month of January, 1919, he had a conversation with Dawson, in the presence and hearing of Fred F. Wilcox, president of plaintiff, relative to the loss of his (defendant's) automobile, but the court would not allow defendant to testify as to the circumstances under which he claimed he had lost said automobile, as set forth in his claim of set off. Wilcox, in rebuttal, testified that neither in January, 1919, nor at any other time, did he hear any discussion between Dawson and defendant relative to the loss of said automobile, and that at the time said note was delivered to plaintiff he had no knowledge that defendant claimed that Dawson was indebted to defendant.

It is contended by counsel for defendant that the trial court erred in not permitting defendant to testify as to the circumstances of the alleged loss by Dawson of defendant's automobile. We do not think that the court erred. Defendant's claim of set off was for unliquidated damages arising out of an alleged tort of Dawson disconnected with plaintiff's claim. This is not a proper subject of set off under our statute. (Hanks v. Lands, 3 Gilm., 227, 232; Higbie v. Rust, 211 Ill., 333, 338; American Laundry Machinery Co. v. Barr, 176 Ill. App., 519, 522.) Furthermore, even conceding that defendant had a proper claim of set off as against Dawson, the proof sufficiently showed that plaintiff became a holder of the note in question in due course and that when it received the note from Dawson it did not have knowledge of such facts that its action in taking the note amounted to bad faith. (Negotiable Inst. Act of 1907, sections 52 and 56; Bradwell v. Fryer, 221 Ill., 602, 605.) Furthermore, defendant claimed in its set off that because of Dawson's negligence in October 1918, the value of the automobile was lost to defendant. If defendant had this claim against Dawson why did defendant issue the note



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in question payable to Dawson in March 1919? The record does not disclose a satisfactory answer to this question.

It is further contended that the trial court erred in refusing to admit in evidence the charter of plaintiff in support of its additional defense of ultra vires, as contained in its amended affidavit of merits. This defense was first raised, and the new evidence offered, thirteen days after the case had been tried on the issues made by the original pleadings and after both sides had rested and the court had taken the case under advisement. The admission of this evidence was a matter resting within the discretion of the court and we do not think that under the circumstances the court abused its discretion. (Hertrich v. Hayes, 202 Ill., 334, 343; Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App., 139, 147.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, F. J., and Matchett, J., concur.



1 - 23483

JOHN W. BROWN and JOHN E.  
BROWN, Trustees,  
Defendants in Error.

vs.

ALWINA OTTO, also known as  
Alwina Steger and WILLIAM H.  
OTTO (also known as WILHELM  
H. OTTO) et al., etc.,  
Plaintiffs in Error.

ERROR TO  
SUPERIOR COURT,  
COOK COUNTY.

221 I.A. 663

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out by Alwina Otto, also known as Alwina Steger, to review a decree of foreclosure and sale entered by the Superior Court of Cook County on the 13th day of July, 1914. The case was heard upon exceptions filed to the report of the master in chancery to whom it was theretofore referred to take evidence and report.

Plaintiff in error raises certain questions as to the powers and authority of a master in chancery, arguing that her constitutional rights have been infringed, but all such questions are waived by an appeal to this court. If it was desired to have these considered plaintiff in error should have sought a different forum. Lixby v. Chicago City Ry. Co., 260 Ill. 478; Lukan v. L. E. & M. E. Ry. Co., 248 Ill. 377; P. C. C. & St. L. Ry. Co. v. Chicago, 248 Ill. 176; French v. The Cloverleaf Coal Mining Co., 190 Ill. App., 400.

The bill upon which the decree was entered was brought by defendants in error John W. Brown and John E. Brown, as trustees, to foreclose a trust deed whereby Alwina Otto and William H. Otto conveyed to the trustee certain premises in Cook County, Illinois, described in the trust deed, bill of complaint and decree to secure an alleged indebtedness represented by certain promissory

1891 - 1892

Monthly average temperature  
and precipitation

1891 - 1892

Monthly average temperature  
and precipitation

1891 - 1892

Monthly average temperature and precipitation

Monthly average temperature and precipitation  
for the month of January 1891 - 1892  
The monthly average temperature for the month of January 1891 - 1892 was 50.0 degrees Fahrenheit. The monthly average precipitation for the month of January 1891 - 1892 was 1.0 inch.

Monthly average temperature and precipitation  
for the month of February 1891 - 1892  
The monthly average temperature for the month of February 1891 - 1892 was 52.0 degrees Fahrenheit. The monthly average precipitation for the month of February 1891 - 1892 was 1.0 inch.

Monthly average temperature and precipitation  
for the month of March 1891 - 1892  
The monthly average temperature for the month of March 1891 - 1892 was 55.0 degrees Fahrenheit. The monthly average precipitation for the month of March 1891 - 1892 was 1.0 inch.



notes made by said Alwina and said William H. Otto to the order of themselves and by them endorsed.

The evidence, as taken before the master, disclosed a variance between the notes or copies thereof (the original notes having been lost) which were put in evidence and the description of the notes as set forth in the trust deed. The evidence also disclosed that this variance was the result of a mistake of the scrivener who wrote the papers. After the filing of the master's report, over objection of plaintiff in error, leave was given complainants to amend their bill, setting up these facts and praying that the trust deed might be reformed so as to express the intention of the parties. Plaintiff in error then filed an answer to the amended bill. No replication thereto was filed by complainant and the plaintiff in error contends that in the absence of such a replication the answer, which denied the material averments of the bill, as amended, and set up affirmative defenses to it, should have been taken as true. No further evidence was taken. Neither plaintiff in error nor any of the parties requested the privilege of offering further testimony. No motion for a re-reference or continuance of the cause was made after the amendment to the bill and the filing of the answer.

The original bill was not sworn to and waived answer under oath and the answer of plaintiff in error to the amended bill was not verified. That under these circumstances the answer required proofs to support it is, we think, established by the cases. Chambers v. Rose, 36 Ill., 171; Jones v. Neely, 73 Ill., 449; W. C. Street Ry. Co. v. Steltzenfeldt, 100 Ill. App., 142.

Plaintiff in error argues that the rule announced in these cases has been changed by the provisions in section 23 of chap. 22, Burd's Revised Statutes, 1919, p. 207:



"Every defendant shall answer fully all the allegations and interrogatories of the complainant, whether an answer on oath is waived or not, except such as are not required to be answered, by reason of exceptions, plea or demurrer thereto allowed."

This section of the Statute has undoubtedly changed the rule theretofore existing that exceptions might not be taken to an unverified answer. Banerle v. Long, 165 Ill., 340; Hair Co. v. Chas. J. Daily, 161 Ill., 379, but the law, as there announced, would not we think change the rule as set forth in the cases cited so as to give to an unverified answer the weight of uncontradicted evidence. Such a provision would not be consistent with the provision of section 30 of the same chapter, that -

" \* \* \* the answer may be made without oath and shall have no other or greater force as evidence, than the bill."

We think, therefore, the contention of plaintiff in error that the allegations of the answer must be taken as true cannot be sustained.

The answer set up as one of the defenses the Statute of Frauds alleging that the evidence of the trust in the lands conveyed was not manifested in writing, and this because of the necessity of reforming the deed. No authority is cited in support of this contention and we think none will be found.

The answer also set up (and plaintiff in error contends the evidence shows) that the notes sued on were not described in the trust deed; that the same were given without consideration; that neither the notes nor the trust deed were ever duly delivered, and that the same were in fact obtained from Alwine Otto by fraud and circumvention.

While by reason of the general character of the exceptions we might well refuse to consider the evidence bearing on these points, (Huling v. Farwell, 33 Ill. App., 236) we have, nevertheless, with a good deal of labor examined it to determine whether

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these points are meritorious. Without discussing the evidence in detail we think the findings of the master, as approved by the chancellor, were justified. The burden of proof in these respects was on the plaintiff in error. Her case on the facts rests upon her own testimony which is, in some respects, improbable, and she is contradicted on material points by several unimpeached witnesses.

We find no error as against plaintiff in error and the decree will therefore be affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.



— 97 —

Term No. 5

Agenda No. 11.

IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM A. D. 1920.

FRANK DOLL,

Defendant in Error,

vs.

RUSSELL and ALLISON DRAIN-  
AGE DISTRICT, WILLIAM  
F. CREWS, DAVID Mc-  
CLARY and ROSS GOOD-  
WIN,

Plaintiffs in Error.

Writ of Error to  
Circuit Court  
Lawrence County,  
Illinois.

FILED

OCT 28 1920

Robert B. Roe  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Opinion by Boggs, P. J.

221 I.A. 663

221 I.A. 713

An action on the case brought in the Circuit Court of Lawrence County by Frank Doll, defendant in error, against the Russell and Allison Drainage District, William F. Crews, David McClary and Ross Goodwin, plaintiffs in error, for damages to Doll's land occasioned by over-flows, whereby certain of his crops were destroyed and soil washed from his land, alleged to have been caused by plaintiffs in error having constructed a cross-levee, whereby the flood waters of the Embarrass River were diverted from their usual course and caused to flow over defendant in error's land. A trial was had resulting in a verdict and judgment in favor of defendant in error for the sum of Seventy-five hundred dollars. To reverse said judgment this writ of error is prosecuted.

The declaration consists of four counts. The first count alleges in substance that on January 1st, 1916, that Doll was in possession and owner of certain land in Section 34, Township 3 North, Range 11 West, in Lawrence County, Illinois; that he was residing upon and cultivating the same, raising corn, oats, wheat and grass, and had been for a number of years prior thereto; that the Russell & Allison Drainage District had constructed a ditch on the outside of its levee and north of plaintiff's land of the width of eight feet and of the depth of four feet through a ridge, which was a watershed and a protection to Doll's land, and thereby caused the course of the overflow water to be changed from its natural course, thrown over and upon the lands of said Doll in increased volumes and with greater velocity than it was wont to do in a state of nature, whereby and by virtue whereof plaintiff's crops were destroyed, and the soil from his land washed away, and that his land lay outside of said Drainage District.

The third count of said declaration is similar to the first.



The second and fourth counts allege practically the same state of facts and in addition thereto the commissioners are charged with the construction of said ditch with an intent to injure defendant in error in his possession of his premises.

To each of said counts the general issue was pleaded and three special pleas. On motion of plaintiff in error the special pleas were stricken from the files. A trial was had resulting in a verdict and judgment as above set forth. Prior to the rendition of said judgment defendant in error dismissed said cause as to the commissioners individually and judgment was entered against said district alone.

The following stipulation on the trial of said cause was made:

First: That the Russell and Allison Drainage District was legally organized under and according to the laws of the State of Illinois in the year A. D. 1883, and is now a legal organization.

Second: That W. F. Crews, David McClary and Ross Goodwin are the legally appointed and acting commissioners of said Drainage District.

Third: That the Cross Levee complained of in Plaintiff's Declaration was ordered to be constructed by the County Court of Lawrence County, Illinois, previous to the doing of *the construction* ~~tion.~~

Fourth: That G. C. Harvey of Mt. Carmel, Illinois, was the engineer in charge of the work of constructing said cross levee, and that the same was constructed according to the plans, profiles and specifications prepared by the said G. C. Harvey, and which were approved by the Judge of the County Court of Lawrence County, Illinois, previous to the doing of said work.

The principal ground urged for a reversal of said judgment is that the verdict is against the manifest weight of the evidence. The Russell & Allison Drainage District was organized under the general Drainage laws of this State in the County Court of Lawrence County in the year 1883. It was organized originally for the purpose of constructing and maintaining a levee along the west bank of the Wabash River for agricultural and sanitary purposes. After its organization, a levee was constructed commencing at the high lands near the line separating the Counties of Lawrence and Crawford, and extending in a southerly direction parallel with the Wabash River to the north line of Doll's land, a distance of approximately eighteen miles. At the south end of the levee it did not connect with any high land, and when the waters of the Wabash River were at flood stage, the greater portion of the low lands in said district were submerged by the water backing up and over the same, resulting in the destruction of growing crops.

The Wabash River forms the eastern boundary of Lawrence County. The Embarrass River enters the county at or near the Northwest corner thereof and flows through said county in a southeasterly direction and empties into the Wabash River at a point located a short distance west of the southeast corner of Section 34, Township 3 North, Range 11





W. A large portion of the land between said rivers and situated west of the line between Ranges eleven and twelve are low, and before the building of the levees, were subject to overflow by the flood waters of the two rivers.

Another drainage district, known as the "Ambraw Drainage District," was organized and a levee constructed to prevent the overflow waters of the Embarrass River from overflowing the low lands in that district, and those situated in the district of plaintiff in error. After this levee was constructed, plaintiff in error constructed a cross-levee, which is the one complained of connecting the levee built by plaintiff in error with the high lands known herein as "Routen Hill," for the purpose of protecting all of the lands within the Drainage District from overflow. Said cross-levee was constructed on a line, the northeast point of which is about one-half mile north of the north line of defendant in Error's lands.

After the construction of said cross levee, there remained unprotected by levee approximately 1500 acres of land, including that of Doll's between the Embarrass and Wabash Rivers, and outside of said Drainage District. Doll's lands are located at the junction of and between said rivers, and have been subject to overflow from the flood waters of both rivers. As is usual, the lands bordering these streams are higher than those situated farther away therefrom. Before the cross levee was constructed, there was a natural drain of some size extending from the north toward the south paralleling the Wabash River and emptying into the Embarrass River near its mouth. This ditch passed through Doll's lands in a state of nature, and was used as an outlet for the waters of an artificial ditch, known as Allison Ditch No. 1. There are bayous in all of said lands, including those of Doll's, into which the waters from both or one of said rivers would flow or back before the major part of said lands would be submerged. Immediately north of said cross-levee, there is a bayou or slough through which the waters of the Embarrass River would flow toward the east and to the low lands through which Allison Ditch No. 1 was constructed, and from thereon down and over Doll's lands. All of said sloughs or bayous extended in an easterly direction from said Embarrass River through what in this proceeding is known as Hickory Ridge.

In the construction of said cross-levee, a continuous ditch was formed connecting the Embarrass River with said Allison Ditch No. 1 by the taking out of the dirt in the making of said levee, and a cut was made through said Hickory Ridge. Doll contends, and his evidence tends to prove that after the construction of said cross-levee a great quantity of water was diverted from the Embarrass River and caused to flow through the ditch constructed along side of said cross-levee, and that the flow thereof was exhilarated to such an extent that said ditch was washed out to more than twice its original size, and that said flood waters were thrown upon and over his land, causing the destruction of about 53 acres of corn, 12 acres of oats, 20 acres of meadow and some pasture land.

It is also contended by Doll that the soil was washed from his land, whereas prior to the construction of said cross-levee,



the flood waters from the Embarrass or Wabash rivers would back up to and upon his land and would leave a silt deposit thereon. The evidence shows that Doll made complaint, whereupon said commissioners caused the construction of three concrete dams to be built across said cross-levee, the top of each being level with the surface of the surrounding lands. The waters, however, flowing, came with such force and violence that the earth around the ends of said concrete dams was washed away, and said dams were destroyed. The evidence of defendant in error is further to the effect that before said cross-levee was constructed, the gauge at Vincennes would have to register 13 to 17 feet before the water would back up the Embarrass River and overflow his lands; but that since the construction of said cross-levee, his lands would overflow when the gauge stands at eight feet; that it would overflow as soon as the Embarrass River was bank full, but that before said cross-levee was constructed, it would not do so. In other words, it appears that the waters of the Embarrass River will now overflow Doll's lands at a stage six feet lower than before the cross-levee was constructed.

The evidence on the part of defendant in Error further tends to prove that his lands were worth approximately \$100 an acre prior to the construction of said cross-levee, but were only worth about \$50 an acre when said suit was brought. That while prior to the construction of said cross-levee he would not always get a full crop, he usually did so, frequently raising from seventy to eighty bushels of corn per acre, but that since the construction of said cross-levee, he was unable to raise more than thirty-five to forty bushels of corn per acre.

The evidence on the part of plaintiff in error tends to prove that the lands of Doll overflowed prior to the construction of said cross-levee and that its construction did not greatly affect or damage the same. The evidence being thus conflicting it was for the jury to say what the evidence proved and in our opinion, there is sufficient evidence to justify the verdict. It is shown beyond a doubt that since the construction of the cross levee, a greater volume of water has been brought to and caused to flow across the lands of Doll, and that the volume is greatly increased over and above that which flowed over his lands in a state of nature, and by virtue thereof, he has been damaged both in his growing crops and in the washing of the soil from his land. While the damages appear to be rather large we are not able to say that they are so excessive as to justify us in reversing the judgment on that ground.

No complaint is made by plaintiff in error on the rulings of the court on the instructions except the refusal of the court at the close of defendant in error's evidence and again at the close of all the evidence to exclude the evidence and to direct a verdict in favor of plaintiff in error.

In connection with the rulings of the court on the peremptory instructions offered, it is argued by counsel representing plaintiff in error that the lands owned by Doll were servient lands and that the waters in question in a state of nature



would flow across the lands of Defendant in error and that plaintiff in error, Drainage District, had the right to increase the rapidity with which said waters would be carried, to and across the lands of defendant in error, if said waters were only such waters as would naturally flow that way. The position of defendant in error has already been stated in the opinion with reference to this contention and is that a large part of the waters that were brought down by the ditch constructed along the side of said cross-levée were waters that ordinarily would not flow that way. In other words, that a large volume of water from the Embarrass River was diverted from its natural course and carried along side of said levee across Hickory Ridge, a natural barrier, into Allison Ditch No. 1, and then on down and across the lands of defendant in error. As heretofore stated, we are of the opinion that the evidence in the record warranted the verdict of the jury in finding that the theory of defendant in error was the correct one, and that the court did not err in refusing to direct a verdict on that ground.

It is argued by plaintiff in error that the construction of said cross-levée was under the direction of the County Court of Lawrence County and that therefore no liability would be incurred by said drainage district providing they acted in compliance with the orders of the court. We do not subscribe to this theory of the law. The lands of the defendant in error were not in plaintiff in error, Drainage District. That being true, said district and its commissioners had no right in the work done in and about the construction of the ditches and levee of said drainage district to damage the lands of defendant in error without becoming liable therefor.

In *Ringing v. Wood River Drain & Levee District*, 212 Ill. App. page 175, this court in passing on a question of this character says: "The evidence discloses that large quantities of water that in times of excessive rainfall flowed off in another direction were gathered into the drainage district and were held by its levees, and carried down the stream to the point where Section A" begins and were then allowed to flow off through the natural channel. We do not think that appellant drainage district should escape liability for the damage done to appellee's land where caused by what, in effect, amounted to a change of the plans, by omitting to construct the outlet for the water gathered by the district within its levees and allowing it to overflow appellee's land."

In *Bradbury v. Vandalia Levee & Drainage Dist.*, 236 Ill. 36, the court at page 46 says: "The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not, is that public involuntary quasi corporations are mere political or civil divisions of the State created by general laws to aid in the general administration of the government and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. (*Kinnare v. City of Chicago*, 171 Ill. 332). Neither the State, nor any part of it, is divided by the legislature into drainage districts, nor do





they have public duties thrust upon them without their consent. The organization of drainage districts is for the sole and exclusive benefit of the territory within the district (Commissioners of Union Drainage District v. Highway Com'rs 220 Ill. 176), and the lands within the district are assessed to pay the whole costs on the theory that they alone are benefited."

It is also contended by plaintiff in error that the court erred in its rulings on the evidence. The only point argued under this assignment of error is that the court erred in allowing defendant in error to give testimony with reference to the value of defendant in error's growing crops which were alleged to have been destroyed. We have examined the record in regard to the error assigned and are of the opinion no serious mistake was made by the court in its rulings on the evidence. At least there was no error of sufficient importance to require a reversal for that reason.

While we have referred to the size of the verdict in this case it may be observed that in the argument of counsel representing plaintiff in error no point is made that the verdict of the jury is excessive. Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Affirmed.

Justice Eagleton took no part in the consideration or decision of said cause.

Not to be reported in full.



Term No. 29

Agenda No. 33

MARCH TERM, A. D. 1920.

AMANDA KIMBERLIN by ELIZA  
KIMBERLIN, her next friend and  
by ANSBY L. LOWE her con-  
servator,

Appellee

vs.

HENRY LAMPING,

Appellant

Appeal from  
Crawford.

FILED

OCT 28 1920

Robert B. Roe  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

221 I.A. 664

OPINION BY HIGBEE, J.

Amanda Kimberlin, as shown by the record in this case, is a widow owning 300 acres of land near Palestine in Crawford county, on which she resided in March, 1919 and she was also at that time possessed of about \$17,000.00 in Government bonds, War Savings Stamps, Bank deposits, Promissory notes and cash. Appellant Henry Lamping is an itinerant merchant and trader. It appears he and Mrs. Kimberlin became quite friendly, and on March 17, 1919 he secured from her three checks aggregating \$950.00 which he cashed. He also secured from her a small quantity of oats and corn which he sold. Upon learning these facts certain of her relatives instituted proceedings to have a conservator appointed for her, and also commenced this suit in her name by Eliza Kimberlin as her next friend. The suit it seems was begun, however, before the conservator was appointed. A trial was had before the court and a jury which resulted in a verdict and judgment for appellee in the sum of \$850. Appellant does not deny receiving the money on the grain, but contends the money was repaid and the grain settled for.

We have carefully examined the record itself in this case to ascertain if sufficient proof could be found to sustain the verdict. Without discussing the evidence in detail we deem it sufficient to say we are of the opinion the verdict is clearly against the manifest weight of the evidence. The only persons who actually knew about the transaction are appellant and Amanda Kimberlin, the ward for whose benefit the suit was brought. They both testified positively that appellant returned to Mrs. Kimberlin \$477 at her home on March 17, and paid her \$700 in St. Louis on March 21, and that he paid for the grain at the time he got it, and also that that she is now indebted to appellant. Appellee introduced Mrs. Kimberlin as a witness and relies on her testimony to establish the original debt, and cannot complain if her testimony be given like weight when as a witness she testified for appellant to the satisfaction of that debt. The record discloses some suspicious circumstances surrounding the relations between appellant and Mrs. Kimberlin, and shows some foundation for the charge that he was seek





ing to obtain money from her, but they are not sufficient upon which to base a verdict for appellee in this case.

While it is with reluctance that courts disturb the verdicts of juries, yet it is the duty of trial courts to set aside the verdict of a jury, which is manifestly against the weight of the evidence and to grant a new trial and the refusal to do so is reversible error. The judgment in this case is therefore reversed and the cause remanded.

Reversed and remanded.

Mr. Justice Eagleton took no part in the hearing of this case

Not to be reported in full.



1778a

Term No. 56

Agenda No. 50

IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

MARCH TERM A. D. 1920.

OCT 28 1920

221 I.A. 604

LAURA CALKIN,

Appellee

vs.

SUMMERS AND DICKEY CO.,  
Appellant.

Appeal from  
Wayne.

221 I.A. 604

OPINION BY HIGBEE, J.

This suit was originally brought by Laura Calkin, appellee, against Summers & Dickey Company, appellant, in a police magistrate's court, to recover \$104.40 which appellee claimed was due her for services as clerk in appellant's store. On the first trial the jury disagreed. The second trial before the police magistrate resulted in a verdict and judgment for appellee in the sum of \$82.80. On appeal to the circuit court the case was heard before a jury and resulted in a verdict and judgment in favor of appellee for \$77.10. From that judgment an appeal has been taken to this court.

The reasons urged in appellant's argument for a reversal of this judgment are that the verdict was contrary to the evidence, and that the court erred in giving instructions in behalf of appellee. It appears that appellee began clerking regularly in appellant's store in June 1918, and continued until July 1, 1919. About the last of April, 1919, appellee applied to a Mr. McQuay, the manager of the department in which she clerked for an increase in her salary. It is claimed by appellee that following this request the manager agreed to pay her a commission of 6% on all sales made by her with "a drawing account of \$40.00 per month" and that at the end of each quarter he would pay her whatever her commissions amounted to over and above the \$40.00 per month. Prior to this time appellee had been receiving \$36 per month. Appellant claims that the agreement was that appellee was to receive a straight salary of \$40 per month. A few days after this agreement appellee was handed a check for \$12 which she claims was in payment of commissions earned by her during the first three months of 1919, but which the manager claims was paid to her so as to make the increase in her salary date from the first of the year. On July 1, a check for \$40 was handed appellee which she objected to, claiming that she was entitled to her commissions for the second quarter of the year, and left the employment of the appellant.

FILED

OCT 28 1920

Robert B. Roe  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



The evidence is very close on the question whether appellee was to receive \$40 per month dating from the first of the year, and that the \$12.00 check was in payment of the balance of such back salary, or whether she was to receive commission of 6% on her sales and the \$12 check was in payment of the balance due on such commission from the first of the year. Outside of the evidence of appellee and appellant's manager there is but little, if any, evidence to sustain or contradict either contention. Under such condition of the proof the jury should have been fully and accurately instructed as to the law in the case. Since we feel that the judgment must be reversed on account of errors in the giving of instructions we do not deem it advisable to express any opinion as to the weight of the evidence. The third instruction given for appellee, and which it is insisted is erroneous, is as follows, "The jury have the right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence, or lack of intelligence, and from all the surrounding circumstances appearing on the trial which witnesses are the more worthy of credit and give credit accordingly." The criticism made of this instruction is that it attempts to enumerate the elements which the jury are to consider in determining to which of the witnesses to give credit and allows the jury to take into consideration "all the surrounding circumstances appearing on the trial", which it is contended would include facts and circumstances not in evidence. Appellee in support of this instruction has cited several cases, only two of which, however, appear to have any direct relation to the question at hand. One of these cases was the *City of LaSalle v. Costa*, 190 Ill. 130, in which the appellant had asked the court to instruct the jury that they had "The right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence and all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit etc." The court modified this instruction by striking out the words "from the appearance of the witnesses on the stand" and gave it as modified. The discussion in the opinion was confined to whether or not the trial court properly modified the instruction by striking out the words named and did not refer in any way to that portion of the instruction which permitted the jury to take into consideration all the other surrounding circumstances appearing on the trial. As this instruction was in fact given for the appellant, it was in no position to criticise the action of the court in regard to the clause last referred to, as it was permitted by the trial court to remain.

The other one of the two cases referred to was *Chicago St. R. R. Co. v. Wellner*, 206 Ill. 272, in which case the clause in question here appeared in the instruction criticised, but the only question there raised was upon the use of the words "their apparent intelligence or lack of intelligence" as applied to the witnesses, and the court only passed upon the right to use the last named clause without referring in any way to the other. These cases therefore do not appear to us to be decisive of the instant case.

On the other hand the Appellant Court for the Second Dis-





trict, in passing upon a similar instruction, in the case of *Ames v. Thren*, 136 Ill. App. 568, said, "the phrase 'all the other circumstances appearing on the trial' is of very doubtful propriety; it should be 'all evidence in the case'; many things might occur on the trial which should not be considered by the jury. The criticism on this part of the instruction made in *Ryan v. People*, 122 Ill. App. 461 we think in point." The *Ryan* case just referred to was decided by this court and there we clearly recorded our views upon the phrase here criticised, and held the same to be erroneous. We there said, "By number 8, the jury are told 'that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as equally balanced.' That is the end of the proposition and is not connected with the proposition which follows, save that the two are included and marked as one instruction. (Identically the same conditions exist in this case.) The second proposition of law, and a part of No. 8 is: 'The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness; their apparent intelligence or lack of intelligence and from all surrounding circumstances as appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly.' Neither proposition contains a correct statement of the law, and linked together as one instruction the error is manifest. It was highly misleading. Whether or not the weight of the evidence is equally balanced, was not a question for the jury upon any issue in this case. The jury are not bound to believe or regard the weight of evidence one way or other except as the judgment is affected by it. Again in determining the weight or credibility to be given to the testimony of witnesses, the most essential and important consideration is omitted in this instruction, viz: 'All the evidence in the case.' The language of the instruction is, 'from all the other circumstances appearing on the trial.' This is not the equivalent of 'all the evidence in the case.'" Our Supreme Court also appears to have passed directly upon this question. In *People v. Terrell* 262 Ill. 138, that court used the following language, "A more serious criticism is that the instruction authorizes the jury, in determining the credibility of the witnesses, to take into consideration all the 'surrounding circumstances appearing on the trial.' This clause is of doubtful meaning. It is proper for the jury to take into consideration the surrounding circumstances appearing from the evidence, but 'circumstances appearing on the trial' might be taken to refer, not to circumstances surrounding the transactions testified about or circumstances shown by the evidence, but circumstances occurring at the trial and the conduct of the witnesses in the presence of the jury while they were not on the witness stand. This part of the instruction should have been omitted." It was there further said that if the "guilt of the defendant were doubtful or the case not clear the giving of the instruction might require a reversal of the judgment." In the case of *People v. Fox* 269 Ill. 300, language almost identical with that used here was employed and it was there said that allowing the jury to take into consideration "all the surrounding circumstances appearing on the trial" made the instruction too broad; that it should have been limited to the other



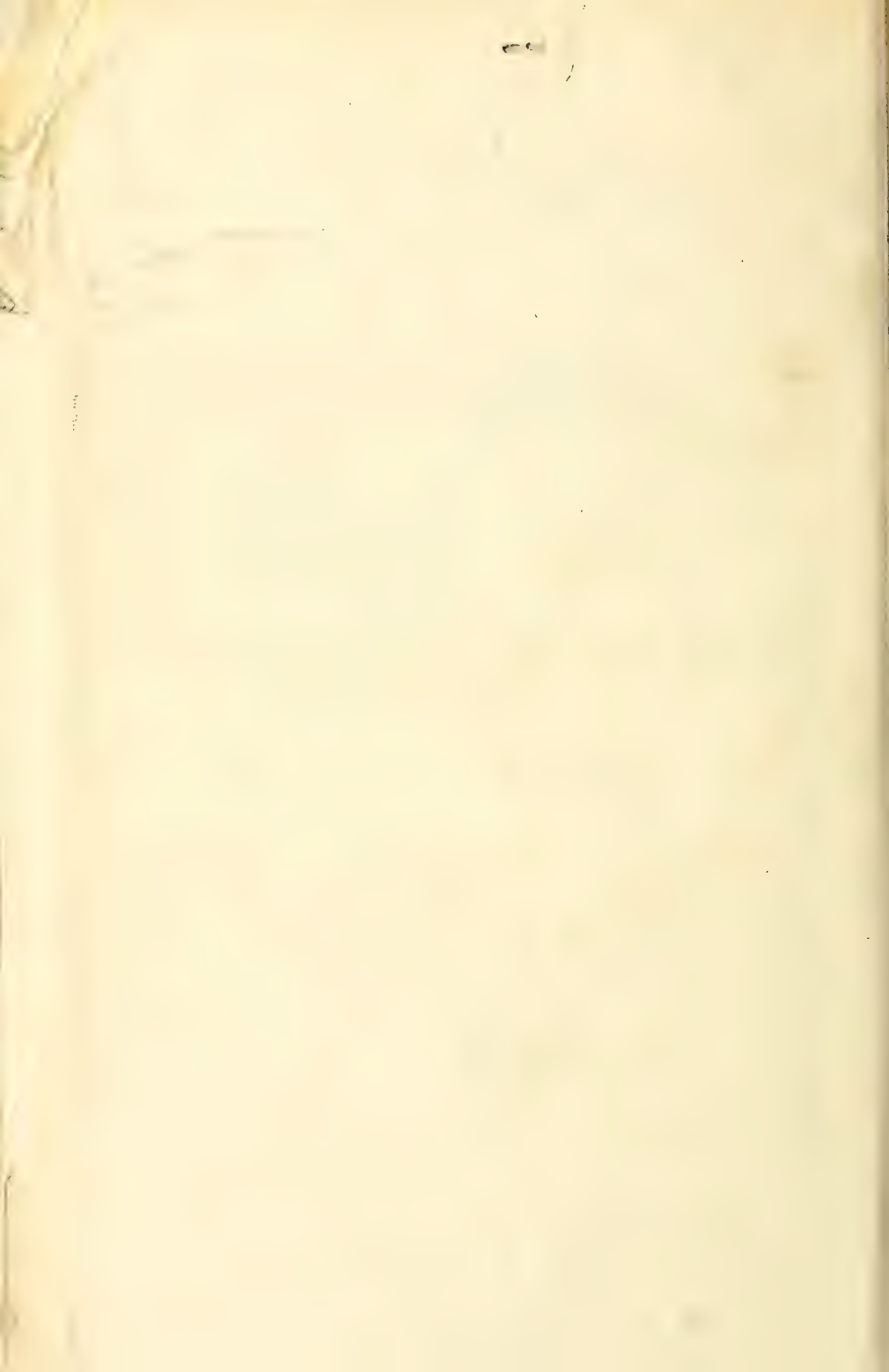
facts and circumstances appearing on the trial.

From a careful consideration of this instruction and the above authorities we conclude that in a case like this, where the evidence was so close that it is difficult to find that it preponderates on either side, the giving of the same was reversible error.

The fourth instruction given for appellee is as follows, "The preponderance of evidence does not depend upon the number of witnesses and does not mean the greater number of witnesses. It does depend upon the weight of evidence and means the greater weight of the evidence." It is contended that this instruction is erroneous because it eliminates altogether the element of the number of witnesses from the jury in determining where the preponderance of evidence rests. There is no question that this instruction is subject to criticism, and that the number of witnesses is one element to be taken into consideration by the jury in determining the weight of evidence. *Chicago Union Trac Co. v. Hampe*, 228 Ill. 346; *Lyons v. Ryerson*, 242 Ill. 409. While we do not hold that the giving of this instruction would of itself call for the reversal of the judgment yet, we believe that in this case which is so close upon the facts, this instruction should not have been given. The judgment is reversed and the cause remanded.

#### REVERSED AND REMANDED.

Mr. Justice Eagleton took no part in the hearing of this case. Not to be reported in full.





1749a  
General No. 7185

Agenda No. 2.

October Term, A. D. 1920

Ezra Patterson, Appellant

221 I.A. 664

vs.

William F. Walker, Appellee

Appeal from County Court Moultrie County.

ELDREDGE J.

Appellant sued appellee before a Justice of the Peace to recover \$100.00 as the purchase price of a horse claimed to have been sold by the former to the latter. A verdict was rendered by a jury in favor of appellee and on appeal to the Circuit Court a similar verdict was rendered.

The defenses interposed were that no sale was consummated and that there was a breach of warranty as to the soundness of the horse. There were no witnesses to the contract except the parties themselves whose testimony is directly in conflict and there are substantially no facts or circumstances in evidence which tend materially to corroborate either party. Under these circumstances the judgment must be affirmed unless some error of law intervened on the trial which deprived appellant of some substantial right.

There were thirteen instructions given on behalf of appellee, ten of which relate to the rules of law in regard to warranties and breaches thereof and it is urged that it was error to give too many instructions upon the same subject. While under some circumstances the giving of too many instructions on the same subject matter might constitute reversible error, we do not think such a error was committed in this instance. The question of warranty was the principal issue in the case and appellant recognized this fact as four out of the five instructions given on his behalf involved the same question.

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Appellee's eighth given instruction is erroneous as it does not require the jury to believe "from the evidence" the facts enumerated, but all the other instructions contain this requirement and the jury could not have been misled by its omission from this particular instruction. C. & E. I. R. R. Co. vs Mochell, 193 Ill. 208; Holliday vs Burgess, 34 Ill. 193. The criticisms of the



other instructions are without merit.

The horse in question at the time of the transaction was in the possession of a third person, and when appellee went to view it, it had a lump or swelling on one of its hind legs and was lame. When he reported these facts to the appellant, he testified that appellant told him the horse was sound and that the lump "don't belong to the horse." On the trial appellee produced several qualified witnesses who testified, in substance, that in the sale of horses, the expression "It don't belong to the horse", when used with reference to an apparent imperfection in the animal, means that such imperfection is but temporary and not permanent and does not affect the soundness of the horse. The testimony of witnesses is admissible to explain words or phrases having a special meaning in a particular trade or business. *Steidtman vs Joseph Lay Co.* 234 Ill. 84. Without an explanation the words quoted would be meaningless to one not conversant with horse dealing, and if they had a special meaning in such business it was proper to prove it. Moreover the correctness of the definition given by the witnesses is not controverted, and no harm could result from their testimony.

We are of the opinion there is no reversible error in the record and the judgment is therefore affirmed.



1750a  
General No. 7214

Agenda No. 5

October Term, A. D. 1920

The People of the State of Illinois  
Defendant in Error.

vs.

John Pokora, Plaintiff in error.

221 I.A. 664

Writ of Error to County Court Sangamon County.

ELDREDGE J.

Plaintiff in error was convicted in the County Court of Sangamon County on five counts of an information charging him with unlawfully selling intoxicating liquors in quantities of less than five gallons without a license in the Town of Woodside, Sangamon County, Illinois, and sentenced to pay a fine of \$100.00 and costs on each count and to be confined in the county jail for a period of ninety days on each count, to run consecutively.

The court, upon its own motion and upon the objection of Dr. John Wheeler, as an interested party, appointed John W. Richardson special bailiff to summon the jurors and ordered a special venire issued therefor. In the venire were the names of thirty-six persons to be summoned as jurors, and the special bailiff returned the same as served. Plaintiff in error thereupon challenged the array of jurors, which challenge was overruled and the action of the court in this regard is assigned as one of the errors complained of.

The brief for defendant in error amounts to substantially a confession of errors as no attempt is made therein to answer the errors complained of by plaintiff in error, but in lieu thereof, it is contended that this court is precluded from considering them because they are not preserved by a bill of exceptions. The transcript of the record contains what purports to be a bill of exceptions and under the authority of *People vs Scanlon*, 265 Ill. 609, and *Central Ill. Public Ser. Co. vs Sullivan*, 294 Ill. 101, it must be deemed sufficient.

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The facts in regard to the summoning of the jurors are substantially the same as appear in the case of *People vs Mankus*, 292, Ill. 425, and consequently the judgment of the County Court must be reversed and the cause remanded.





1751a  
General No. 7227

Agenda No. 8.

October Term, A. D. 1920

E. J. Croxton and Frank Bates, partners as  
Croxton & Bates, Defendants in Error.

vs.

James A. West, Plaintiff in Error

221 T A. 664

Writ of Error to Circuit Court Sangamon County.

ELDREDGE, J.

Defendants in error recovered a judgment in the Court below for the possession of a top wagon or moving van in an action of replevin. They have filed no brief in this Court and for that reason the judgment may be reversed **pro forma**. We have carefully read the evidence in this record however, and can come to no other conclusion than that the verdict is clearly contrary to the manifest weight thereof. For the reasons named, the judgment is reversed and the cause remanded.

710 brief filed for  
appellee



1752a  
GENERAL NO. 7228

AGENDA NO. 17

October Term, A. D. 1920

H. M. Nutterfield, Appellee

vs.

Alfred Dann, Appellant

221 I.A. 665

Appeal from Circuit Court, Vermilion County.

ELDRIDGE J.

Appellee brought suit in assumpsit against appellant to recover an alleged overpayment of \$600.00 on the sale of 84 hogs to the former by the latter and also including the sum of \$300.00 on the claim that appellee paid for three of the hogs twice. The jury rendered a verdict for \$461.82 on which judgment was entered.

Appellee testified that he bought the hogs at \$16.80 per hundred weight and that there was a mutual mistake made in the computation of the weights, while appellant testified that the sale was made for the lump sum of \$3739.68.

In regard to the three hogs for which appellee claims he paid twice, the evidence shows that he purchased them earlier in the day before the purchase of the other hogs was made and gave his check for \$194.30 for them and when the latter purchase was consummated he, by mistake, added the weight of the three in with the weight of the other hogs.

Without stating in detail the evidence supporting the respective contentions of the parties, it is sufficient to say that it was conflicting and it was for the jury to determine with whom the weight lay. There is sufficient evidence to support the verdict and the clear and manifest weight thereof is not contrary thereto.

It is contended by appellant that the evidence does not show that there was a mutual mistake because the weighing of the hogs was done by appellee and as appellant had nothing to do with it the latter was ignorant of any mistake if made, and if any had been made, it was unilateral and not mutual. From the facts disclosed by

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this record we cannot agree with this conclusion. The evidence introduced on behalf of appellee tends to show that each party figured the amount to be paid for the hogs at \$16.80 per hundred weight upon the





mistaken assumption that their total weight was 22260 pounds. In other words appellee agreed to buy and appellant agreed to sell the hogs at \$16.80 per hundred weight. The hogs were weighed in several lots as the scales would accommodate but a certain number at a time. In computing the total weight a mistake was made and appellee paid for more weight of hogs than he received. The mistake consisted in the belief of both parties that the weight of the hogs was 22260 pounds, and this was a mutual mistake. *McClasky vs. McCormick* 44, Ill. 336; *Devine vs. Edwards*, 101 Ill. 131; *McLean County Bank vs. Mitchell*, 88 Ill. 52; *Stempel vs. Thomas* 89 Ill. 146; *McFarlane vs. Williams*, 107 Ill. 33

The testimony of the witness Forsyth was taken by deposition, the admission of which in evidence is assigned as error. This witness testified that he lived in the city of Indianapolis, Indiana and was employed by the commission firm of Joseph S. Taylor & Co., to whom appellee had consigned the hogs. He then testified as to the weight of the hogs when received at the Union Stock Yards at Indianapolis. No objection was made to the question eliciting this information until the deposition was read at the trial when an objection was made on the ground that the witness had not testified that he had weighed the hogs personally or had seen them weighed and was not therefore qualified to testify as to their weight when received at Indianapolis. The objection goes to the competency of the witness and not of the evidence, and could have been obviated if the objection had been made in apt time, so the witness could have testified as to the source of his knowledge or the deposition of another witness taken who knew the facts of his personal knowledge. The usual method and the proper practice in this state, when it is desired to exclude testimony taken by deposition on the ground of the incompetency of the witness, is to make a motion to suppress the deposition at the earliest opportunity before the trial, and it is too

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late to make the objection at the trial. *I. C. R. R. Co. vs. Faulks*, 191 Ill. 57; *Hutchinson vs. Bambas*, 249 Ill. 624. Objections to depositions which may be obviated by a re-examination of the witness or by taking another deposition, cannot be heard after the case is called for trial. If a motion to suppress is made, it must be made



at the earliest opportunity so that a new commission may be issued. It is too late to wait until the cause is called for trial. *Kassig vs. Mortimer*, 80 Ill. 602. The witness Watts testified on behalf of appellee that he had had about eight years experience in weighing hogs and that he helped drive the hogs in question onto the scales and to load them into the cars; that from his experience they would average 210 pounds in weight a piece. This testimony was objected to generally, by appellant. Fisher, a witness for appellant, gave his judgment as to the weight of some of the hogs. If it was error to admit such testimony each party is equally culpable and neither can complain. Moreover no attempt was made by appellant to dispute the correctness of the evidence for appellee as to the actual weight of the hogs, and the error, if any was a harmless one.

It is also complained that the instructions given on behalf of appellee did not define "mutual mistake." Appellant also gave a number of instructions using these words without their definition. If he was of the opinion that the jury would not understand them without a legal definition he had the opportunity to furnish them with one. A party cannot complain of errors in his opponent's instructions when the same appear in his own.

Other errors are mentioned which we do not consider of sufficient merit to discuss here.

The judgment of the Circuit Court is affirmed.



General No. 7232

Agenda No. 20.

October Term, A. D. 1920

W. J. Skinner, Appellant,

vs.

R. E. Parks, Appellee.

221 I.A. 665

Appeal from Circuit Court Sangamon County.

ELDREDGE J.

Appellant and appellee entered into a written contract whereby the former agreed to buy from the latter "the following described property known as a six room house and three acres, more or less, located on the South Sixth Street road south of I. T. S. R. R. on the west side of road, consideration \$4650 cash upon the production of abstract to date showing merchantable title and deed to same."

One hundred dollars was paid on the purchase price at the time the contract was signed. Prior to the execution of the contract appellant and appellee had examined the property in question and appellant had become fully conversant with the character and extent of the property and stated that it was large enough for his purposes. He refused to pay the balance of the purchase price because the property did not in fact embrace three acres but only about 1.86 acres, and brought this suit to recover the advance payment of \$100.00. A judgment was rendered in the Court below in favor of appellee, from which appellant appeals.

The agreement described the property as containing three acres "more or less." Appellant had full knowledge of the actual extent of the property and could not have been deceived in regard thereto. The words "more or less" under such circumstances will be considered as covering the discrepancy mentioned. The judgment is affirmed.





(1754a)

General No. 7213

Agenda No. 4

October Term, A. D. 1920

C. L. Aygarn, Plaintiff in Error,

vs.

C. A. Larson, Defendant in Error

221 I.A. 665

Error to the Circuit Court of Ford County.

WAGGONER, J.

Plaintiff in error, C. L. Aygarn, brought an action on the case to recover damages for personal injuries sustained by reason of having been struck by an automobile driven by defendant in error, C. A. Larson. At the close of the evidence for the plaintiff, the court directed a verdict for the defendant and such action of the court, in directing a verdict, and entering judgment thereon is assigned as error.

The injury occurred about one o'clock in the afternoon of May 24, 1918, in the city of Paxton, Illinois. Railroad avenue is one of the principal streets in that city and runs in a northerly and southerly direction. It is intersected, at right angles, by Pells street which runs in an easterly and westerly direction. Plaintiff in error was returning, from dinner to work and was walking in an easterly direction on the sidewalk on the south side of Pells street. When he came to

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the intersection of that street with Railroad avenue, after looking north, east and south, started to cross Railroad avenue at an angle to the southeast. Defendant in error was following him down Pells street in a Ford runabout. He (defendant in error) turned into Railroad avenue and struck plaintiff in error with the right fender of his (defendant in error's) automobile, knocked him down and rendered him unconscious. The court improperly struck out evidence showing that no horn was sounded by defendant in error. Plaintiff in error was in plain sight and there is no excuse, apparent from this record, why the defendant in error should have run into him. Defendant in error, in spite of the fact that the evidence shows that his automobile was going only from six to eight miles an hour, went about one hundred and fifty feet after striking plaintiff in error before he could stop his car. Plaintiff in error was struck with such force that it turned him



so that his feet were in the direction the automobile was going. The evidence shows that plaintiff in error, when struck, was some place between the center of Railroad avenue and the east curbing about thirty to thirty-five feet south of the Pells street crossing. Defendant in error was on the left side of the street. If he had been on the right of the center of the street,

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the accident would not have occurred. We do not mean to say that defendant in error was a trespasser when on the left side of the street, nor that it was negligence per se to drive on that side, but we do say that it was evidence from which the jury might reasonably have found that defendant in error was negligent. The fact that plaintiff in error was struck by defendant in error when the latter was driving on the left side of the street, together with other facts in evidence, might reasonably justify the jury in finding that the plaintiff in error was in the exercise of due care at the time he was injured.

Whether there was evidence tending to establish due care on the part of plaintiff in error and negligence on the part of defendant in error was a question of law for the court to pass upon, when asked to direct a verdict. *Voight v. Anglow American Products Company*, 202 Ill. 462, 465. Ordinarily, the questions of negligence and contributory negligence are questions of fact and only become questions of law when from the undisputed facts reasonable men must arrive at the same conclusion. *Ward v. Chicago and Northwestern Ry. Co.*, 165 Ill. 462, 464; *Chicago City R. R. Co. v. Gemill*, 209 Ill. 638, 641; *Mueller v. Phelps*, 252 Ill. 630, 634. An instruction directing a verdict should never be given where there is evidence tending

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to prove the material averments of a declaration. *Libby, McNiel & Libby v. Cook*, 222 Ill., 206, 211. "Courts are not at liberty to say, as a matter of law, that one must conduct himself in a particular manner and observe a certain line of conduct in each case and under all conditions. Negligence does not become a question of law, alone, unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing them so." *Chicago, Burlington & Quincy R. R. Co., v. Pollock*, 195 Ill. 156, 163.





This is clearly a case that should have been submitted to a jury. The foregoing statement, of the case, shows evidence tending to prove negligence on the part of defendant in error and due care of the plaintiff in error. We cannot, therefore, hold that reasonable men must all agree that the defendant in error was not negligent or that plaintiff in error was guilty of contributory negligence.

The judgment of the circuit court is reversed and this cause remanded.

Reversed and Remanded.

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October Term, A. D. 1920

William Hughes Diller and Isaac R. Diller,  
Plaintiffs in error

vs.

Standard Accident Insurance Company,  
Defendant in error

221 I.A. 665

Error to the Circuit Court of Sangamon County.

WAGGONER, J.

Isaac R. Diller lived in Springfield, Illinois. His son, William Hughes Diller, was a student attending Harvard University. The family purchased an automobile as a present for the son. The father, son and other members of the family resided at 511 West Carpenter street, where the car was kept in a garage and used by the members of the family as a family car for pleasure riding.

On May 15, 1909, John Lanphier, an insurance broker solicited Isaac R. Diller for liability insurance for loss from accidental injuries. An application was prepared and signed William Hughes Diller by Isaac R. Diller, father, and a policy was issued thereon to William Hughes Diller.

In October 1909, during the term of the policy, Isaac  
Page 1

R. Diller, while driving the automobile, struck and injured Arthur W. Ferriera, a minor, who was riding on the street on a bicycle. A suit for damages was brought by the boy against Isaac R. Diller, which suit the defendant in error refused to defend. The boy finally recovered a judgment for \$2500.00 and costs (Ferriera v. Diller, 193 Ill. App. 551). Isaac R. Diller paid the judgment.

This suit was brought by filing a bill in equity to reform the policy so as to include within the terms of the insurance the complainant, Isaac R. Diller, and to enforce the same as reformed by awarding indemnity for the loss sustained in the suit brought by Ferriera. The claim is that by mutual mistake the name of Isaac R. Diller was omitted from the policy as one of the parties insured.

To entitle the plaintiffs in error to a decree reformation it was incumbent on them to prove the alleged mistake by clear, satisfactory and convincing evidence. Buck v. Garber, 261 Ill. 378, 386. This they have failed to do. The master in chancery who saw and heard the



witnesses found that there was no mistake in the application for insurance and that the policy

Page 2

issued thereon contained the true contract between the parties. This finding was approved by the Chancellor. We have carefully examined the evidence and we cannot say that its weight is clearly and palpably against the decree dismissing the bill. *Treloar v. Hamilton*, 225 Ill. 102, 107.

The decree is therefore affirmed.

Decree affirmed.

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17506  
General Number 7223

Agenda 13

October Term, A. D. 1920

Joseph Anderson, Defendant in Error

vs.

John Anderson, et al., Plaintiffs in Error.

Error to Circuit Court, Coles County

WAGGONER, J.

221 I.A. 665

Elias Anderson died, intestate, seized of one hundred five acres of land in Coles County, Illinois. He left surviving him Eliza Anderson, his widow; three sons, John, Joseph and Tilden Anderson; two daughters, Mary Rennels and Esta Darling, and Murl Murphy, the only child of a deceased daughter, Louise Murphy, as his only heirs.

On October 1, 1910, Joseph Anderson purchased the interest of his brother John Anderson and sister Mary Rennals in the one hundred five acres of land and received from them a warranty deed for their undivided interests, for which he paid each of them one thousand dollars. At the same time each of them executed an assignment of their future interest in their mother's estate. On September 30, 1911, Joseph Anderson purchased, for twelve hundred dollars, the interest of his sister Esta Darling in the

Page 1

one hundred five acres of land and received a warranty deed from her together with an assignment of all her future interest in her mother's estate. On April 2, 1914, Joseph Anderson purchased, for one thousand dollars, the interest of Murl Murphy in the one hundred five acres and received from her a warranty deed, and she signed the assignment previously executed by Esta Darling. Joseph Anderson purchased, for fourteen hundred dollars, the interest of his brother Tilden Anderson in the one hundred five acres of land and received a deed from him, but the latter refused to sign the assignment of his future interest in his mother's estate.

The form of the assignments, omitting the dates and signatures is as follows:

"For and in consideration of sale of our respective interests in lands of Elias Anderson, deceased, to Joseph H. Anderson, and of the payment of one dollar to each of us respectively, we hereby assign to Joseph H. Ander-



son all interest in the property of Eliza Anderson that she now has or may hold at the time of her death, and we authorize the executor or administrator of the estate of Eliza Anderson to pay to Joseph H. Anderson any part of said estate that may be coming to us, if there should be found

Page 2

to be any such."

Eliza Anderson died testate September 1, 1918, seized of lot ten in Hodgen's Addition to Charleston, Illinois, and personal property worth, approximately one thousand dollars. By her will she gave her household goods to her granddaughter, Murl Murphy, and directed the executor of the will to sell all the rest of her property, real and personal, and divide the money equally among her five children and her granddaughter above named, giving one-sixth thereof to each. The will was probated and Fred G. Hudson appointed executor. The executor sold all the property and has for distribution \$1994.30.

Joseph Anderson produced the assignments and claimed the interests of the four who had signed them. The defendants all denied selling their future interest in the estate of Eliza Anderson and claimed that the assignment was executed to bar them from claiming any future interest in the one hundred five acres of land after the death of Eliza Anderson.

The defendant in error, Joseph Anderson, filed his bill in equity to enforce the assignments. The plaintiffs in error answered, averring that the assignments were without consideration; that Eliza Anderson claimed what she called a child's

Page 3

part in her husband's lands and built a house on a fifteen acre tract, which was a one-seventh of said one hundred five acres, and that the plaintiffs in error signed said assignments in order to guarantee that they would make no claim in the said land as heirs of Eliza Anderson; that the dollar consideration mentioned in the assignments was never paid; that the paper was never read by defendants and that nothing was paid except the amount recited in the respective deeds; that the assignments were fraudulent and that there were no negotiations whatever about assigning their future interests in their mother's estate; that the assignment was not understandingly entered into, and that it was signed





wholly with the view that it was necessary to do so to clear the one hundred five acres of land.

The cause was heard before the chancellor. All the children and the granddaughter testified and were the only witnesses. The court found that John Anderson, Mary Rennals, Esta Darling and Muri Murphy, for an adequate consideration before the death of Eliza Anderson, sold and conveyed to Joseph Anderson all their future interest in the estate of Eliza Anderson and entered a decree directing the executor to pay under said assignment

Page 4

four-sixths of said estate to Joseph Anderson.

The evidence in the record is very unsatisfactory. This is much to be regretted for the court cannot act with any feeling of assurance that it is right. However, the parties have no one to blame but themselves as they should have proven the facts more clearly as they undoubtedly could have done with a little care.

Joseph Anderson claims that no mistake was made and that the assignment expresses the true contract. He testified that in 1911 that one hundred five acres of land was worth from fifty to sixty dollars an acre. He makes a very poor explanation of the transactions. He does not claim to have paid anything for the assignments but the one dollar consideration therein mentioned. The assignments contradict this as they purport to have been made in consideration of the sale of the interest in the land as well as in consideration of one dollar. The plaintiffs in error deny receiving the dollar mentioned while defendant in error testified that he gave a dollar to each of them. The plaintiffs in error say they did not read the assignment but accepted the representation of the defendant in error that it was to prevent them claiming an interest in the one hundred five acres of land after the death of Eliza Anderson. Defendant in

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error testifies that it was read to all of them with the possible exception of Esta Darling.

Plaintiffs in error claim that there was talk among the parties that Eliza Anderson was entitled to a child's share (an undivided one-seventh of the one hundred five acres of land) and that she had built a house on a fifteen acre tract of said land. Of course it was a misunderstanding to think that Eliza Anderson was entitled to a



child's share or one-seventh of said land but this is advanced as an explanation of the reason for signing and the purpose to be accomplished in signing the assignment. Plaintiffs in error claim that it was the talk, and intent by this assignment, that it was to prevent them claiming any interest in said portion after the death of Eliza Anderson and further testify that there was no talk whatever about purchasing anything except the interest in the one hundred five acres of land and that all they sold was their interest therein; that they never sold or talked of selling their future interest in the estate of Eliza Anderson and that such a subject was never mentioned.

It has been repeatedly held that estates in expectancy are an appropriate subject of contract, and that agreements by expectant heirs in regard to their future contingent estates,

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when fairly made upon a valuable consideration will be enforced in equity. *Hudson v. Hudson* 222 Ill. 527, 530.

This case depends on a question of fact. Were the contracts fairly entered into upon a valuable consideration? The assignments are simple, clear and unambiguous. The parties signing them could read and write and were under no disability. This written evidence cannot be lightly disturbed. Nevertheless, we can see in the light of the defendant's contentions how they might have well misunderstood the assignments. The chancellor found that the assignments were fairly entered into for a valuable consideration. The chancellor saw and heard the witnesses testify, and this court cannot reverse upon questions of fact unless it is apparent the trial court has committed palpable error. *Hudson v. Hudson*, 222 Ill. 527, 529. We can not say that the weight of the evidence is clearly and palpably against the decree. (*Treloar v. Hamilton*, 225 Ill. 102, 107) and therefore affirm the decree.

Decree affirmed.

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General No. 7226.

Agenda 16.

October Term, A. D. 1920

Joseph T. Delfosse, Appellant

vs.

Mary A. Whalen, administratrix of the estate  
of A. M. Applegate, deceased, Appellee.

Appeal from Circuit Court of Pike County

WAGGONER, J.

221 I.A. 666

A. M. Applegate operated a grain elevator and re-tailed coal at Pearl, Pike County, Illinois. He was a good business man and transacted a large amount of business. He was an epileptic and this malady so afflicted him that it finally undermined his mental and physical strength and he died in November, 1918, at the age of forty-seven years. He had been afflicted with epilepsy from the time he was sixteen years old. The disease gradually grew worse and the epileptic seizures occurred almost daily during the last years of his life.

On August 1, 1917, one Arthur G. Wilson, who represented that he was president of the North American Investment Company secured the signature of A. M. Applegate as surety on a note

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for \$2500.00, for the accommodation of the company. The note was payable to the order of "ourselves", endorsed by the company and A. M. Applegate. Arthur G. Wilson gave Applegate a note for \$2500.00, signed by the company, to indemnify him against loss and put up as collateral a certificate of stock for ten thousand shares, of the par value of one dollar a share, of the capital stock of the Las Animas Peak Gold Mines Company, an Arizona corporation. The entire transaction on the part of Arthur G. Wilson and of the company was a gross fraud.

This suit, brought on the note against the administratrix of the estate of A. M. Applegate, deceased, is defended on the ground that the decedant was an epileptic and at the time of signing the note was so mentally deranged and incapacitated by the influence and effect of an epileptic paroxysm as to be unable to know what he was doing.

The only error urged is that the verdict is against the weight of the evidence. No error is urged in reference to giving or refusing instructions, or in the ad-





mission or exclusion of evidence. This court will not disturb the

Page 2

verdict of the jury unless the verdict is clearly and manifestly against the weight of the evidence. Chicago City Ry. Co. v. McClain, 211 Ill. 589, 596; Chicago and Grand Trunk Ry. Co. v. Stewart, 77 Ill. App. 66, 68; Toledo, Wabash and Western Ry. Co. v. Moore, administratrix, 77 Ill. 217, 219.

Appellant made no motion for a directed verdict and is therefore held to have confessed that there was evidence to justify submitting the case to the jury. The question therefore before us is one of fact and not of law. Warth v. Loewenstein & Sons, 219 Ill. 222, 224, 225. Ardison v. Illinois Central R. R. Co., 249 Ill. 300, 302.

There was ample evidence to justify the jury in finding that on the day the note in question was signed Arthur G. Wilson found A. M. Applegate about ten o'clock in the morning sitting in a chair on his porch in a drowsy condition; that he had been seized with two epileptic fits that morning and was still drowsy and dazed from the seizures; that he then went with Arthur G. Wilson across the street to his (Applegate's) office and was gone about twenty minutes; that he came back and was immediately seized with another fit; that it was about

Page 3

thirty minutes between these epileptic seizures, and he had several others the same day. The evidence also clearly shows that during this interval when he signed the note he was in a dazed condition, not competent to transact business and the jury were fully justified in finding in favor of appellee on the evidence.

The only other contention is that letters written by A. M. Applegate to appellant, after the note had been purchased by the latter, shows a ratification of the note. We do not so understand the letters. All that is shown by the letters are admissions that he knew he had signed a note. They therefore tend only to contradict the evidence of appellee. Where the evidence is contradictory the verdict of the jury must stand. Many of the letters are not intelligible and for that reason tend strongly to prove appellee's case. In considering these letters we must bear in mind that appellant, with a foresight and diligence that evidences more caution than innocence,



notified A. M. Applegate by a letter dated August 8, 1917, that he had purchased his "note dated August 1, 1917, \$2500.00 with interest, due November 1, 1917." All of Applegate's letters are subsequent to this. So it is clear that what was said by

Page 4

Applegate in his letters could in no way have prejudiced appellant who had already purchased the note according to the claim made by him in his letter of August 8. The statements in the letters written by Applegate cannot under these circumstances be construed or considered as a ratification. As admissions they are fully and satisfactorily overcome by the evidence showing the true facts relative to Applegate's condition at the time he signed the note and from which the jury were fully justified in returning the verdict they did.

The judgment of the circuit court is affirmed.

Affirmed.

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1758a1  
Gen. No. 7231

Ag. 19

October Term, A. D. 1920

J. F. Hare, coroner for the use of L. J. West,  
Plaintiff in Error

vs.

Clifford Arrowsmith, Hal Fawver and J. H. Fawver  
Defendants in Error

Error to the Circuit Court, McLean County.

221 I.A. 666

WAGGONER, J.

Plaintiff in error brought an action in debt on a replevin bond for \$8000.00, signed by Hal Fawver, as principal, Clifford Arrowsmith and J. H. Fawver as sureties, in the case of Fawver v. Flesher, Sheriff of McLean County, 208 Ill. App. 21. The facts regarding the former litigation are fully stated in that case and need not here be repeated. Hal Fawver sought to obtain a review of the former case by the Supreme Court but a writ of certiorari was, by that court, denied. It is stipulated that there is due L. J. West \$5,460.51 on the judgment recovered by him against Hal Fawver.

After the final determination of the former suit an order of affirmance was filed in the Circuit Court, a writ of returno was issued and there was returned to the sheriff, by the Fawvers, the remaining remnants of the stock of merchandise, which the

Page 1

sheriff sold at public sale for \$356.24. The evidence shows that the stock of merchandise seized by the sheriff and taken from him by Hal Fawver, on a replevin writ, was reasonably and fairly worth \$4000.00. Subtracting from that amount the sum of \$356.24, realized by the sheriff on the sale of the goods returned, it leaves \$3643.76 as the value of the goods not returned and the depreciation in value of the merchandise that was returned.

The trial court should have held that the plaintiff had proved the damages to be \$3643.76 for the goods not returned together with the depreciation in the goods that were returned (Frank v. Matson, 211 Ill. 345, 347) to which should be added \$500.00 attorney fees, \$5.95 cost on the writ of returno, together with interest at 5% from July 7, 1915, the date of the replevin, to the date of the judgment, <sup>there</sup> on the sum of \$3643.76, making a total of



#5203 <sup>35</sup>  
~~\$4697.39~~

We find as an ultimate fact that the fair cash market value of the goods not returned and of the depreciation in value of the goods returned was \$3643.76 at the time (July 7, 1915) and place of replevin.

The judgment of the circuit court will be reversed and a judgment entered in this court in favor of the plaintiff in error

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#5203 <sup>35</sup> and against the defendants in error for ~~\$4697.39~~ and costs in accordance with the views above expressed.

Reversed with finding of facts, *and judgment*

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*in favor of Plaintiff in error and  
against defendants in error for #5203. <sup>35</sup>*



(1757a)

General No. 7251

Agenda No. 37.

October Term, A. D. 1920

Flora M. Nelson, Appellee,

vs.

Richard Elmer Nelson, Appellant.

Appeal from Circuit Court, Hancock County.

WAGGONER, J.

221 I.A. 666

Appellee having filed her bill for separte maintenance, the circuit court on her application entered an order requiring appellant to pay her fifty dollars with which to retain counsel and forty dollars a month alimony until the further order of the court. Appellant prayed and perfected an appeal to this court, and an opinion in that case was filed at the October term, 1920, Nelson v. Nelson, General number 7186.

Upon appellant's perfecting an appeal, in the former case, appellee filed her petition in the circuit court for an allowance of solicitor fees, expenses of printing briefs and clerk costs in the appellate court and an order was entered allowing appellee two hundred and fifty dollars solicitor fees for services in the appellate court; twenty-five dollars for printing a brief and ten dollars for the clerk's filing fee.

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The present appeal is from the latter order.

The opinion in the former case is applicable here and for the reasons there given the order in question is affirmed. The chancellor very properly allowed two hundred and fifty dollars instead of five hundred dollars attorney fees for service in the appellate court.

Affirmed.





General No. 7254.

Agenda 40.

October Term, A. D. 1920

Addie M. Tobias, Appellee,

vs.

221 I.A. 666

Illinois Central Railroad Co., Appellant

Appeal from the Circuit Court, Champaign County.

WAGGONER, J.

Appellee Addie M. Tobias, brought an action against the appellant Illinois Central Railroad Co., before a justice of the peace, and on an appeal to the circuit court it was tried before a jury and a verdict rendered for the appellee assessing her damages at \$280.00. Judgment was entered on the verdict.

Appellee's claim is for services in preparing a bill of exceptions of one thousand three hundred pages, with a carbon copy, for appellant jointly with the other defendants in the case of Sangamon and Drummer Drainage District v. Houston, et als., 284 Ill. 406. Her bill is \$780.00 and \$500.00 has been paid leaving a balance due as she claims, of \$280.00.

The case of Sangamon and Drummer Drainage District v. Houston, et als., was tried in the county court of Champaign county. The law firm of Schnider and Schnider, of Paxton, Illinois, represented twenty land owners who were objectors in the case.

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The law firm of Green, Palmer and Jones of Urbana, Illinois, represented the appellant railroad company who was also an objector.

After the objections were filed the law firm of Green and Palmer were retained to represent the land owners together with Schneider and Schneider. An appeal was taken to the Supreme Court, from the judgment of the county court by the land owners and the appellant railroad jointly. C. S. Schneider, of the firm of Schneider and Schneider, ordered appellee to prepare the bill of exceptions. Mr. Palmer also talked with her about how the work was progressing from time to time; received the bill of exceptions from her when it was completed and told her she would get her money. Both Green and Palmer repeatedly urged her to complete the bill of exceptions as quickly as possible as the time in which to file the record in the supreme court was short



and received the bill of exceptions from her in installments and sent the same to Schneider and Schneider.

Appellant now claims the order for the bill of exceptions was not by it, or its authorized agent or attorney, but was ordered by Mr. Schneider for the land owners and that there was an understanding between the land owners, represented by Schneider and Schneider on the one hand,

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and the appellant railroad represented by Green, Palmer and Jones on the other hand, that the land owners should order and pay for the bill of exceptions and the appellant railroad should only be liable for its attorney fees on the appeal. If this were true it was the duty of the attorneys, Green, Palmer and Jones, who represented the appellant railroad, to communicate that limitation on the liability of their client to the appellee and not actively avail themselves of her services for their client's benefit and then seek to defeat her claim for pay by attempting to show this secret limitation on their client's liability. *Noble v. Nugent* 89 Ill. 522, 524; 31 Cyc. 1327, 1329.

Green, Palmer and Jones were, it is admitted, attorneys of the appellant with power to appeal its case to the supreme court and did so. It necessarily follows that as such attorneys they had the power and authority to order a bill of exceptions which was one of the necessary things to be done in perfecting the appeal. The appeal was taken jointly by the appellant railroad company and the land owners. Both Mr. Green and Mr. Palmer as above stated, repeatedly urged the appellee to complete the bill of exceptions. Mr. Palmer received it from her when it was completed, told her she would be paid and delivered it to Schneider and Schneider. Appellant used the bill of exceptions on its appeal. These facts at

#### Page 3

at least show an implied order or contract by appellant for the bill of exceptions through its attorneys and are also sufficient to show that the order for the bill of exceptions, given by Mr. Schneider, was ratified by Green, Palmer and Jones as attorneys for the appellant railroad company.

The court and jury are not to look at these facts in an artificial manner but are obliged to use common sense. There would be absolutely no sense in the dif-





ferent appellants each ordering an original and a carbon copy of the bill of exceptions. Mr. Green and Mr. Palmer can not claim that because they were members of the firm of Green and Palmer and also of the firm of Green, Palmer and Jones, they were talking as representatives of the land owners and not as attorneys for the railroad company. The railroad company was in need of this bill of exceptions. How under these facts could anyone conclude otherwise than that Mr. Green and Mr. Palmer were speaking for the appellant? It follows that appellant and the land owners are jointly liable in this case to appellee and being jointly liable appellant is severally liable. (Sec. 3, Chapt. 76, Hurd's Revised Statutes.) A judgment in this case cannot be binding on the land owners who are not parties. We only mention the matter of joint and several liability because appellant in its argument makes the claim that the land owners are

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liable and not appellant.

Finding no error in the ruling of the trial court in the admission or exclusion of evidence nor in giving or refusing instructions and believing the verdict to be supported by the evidence, we affirm the judgment.

Judgment affirmed.

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1761a  
Gen. No. 7273

Ag. 55

October Term, A. D. 1920

C. S. Bryant, Appellee

vs.

Joseph Smith, Appellant

221 I.A. 666

Appeal from the Circuit Court of Sangamon County.

WAGGONER, J.

This was an action of replevin brought by appellee, before a justice of the peace, against appellant to recover five hogs and was, by the former, appealed to the circuit court where three trials of the case have been had before juries. On the second trial the jury failed to agree upon a verdict. On the other two trials verdicts were returned in favor of appellee, one of which was set aside and a new trial granted. The controversy between the parties was as to the identity of the hogs. Each party claimed to identify them as being hogs owned by him and the testimony of the witnesses, heard on the trial, supported the claim of one or the other of the parties.

The criticism made of appellee's instructions one and two is not merited. It was sufficient to have entitled

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him to recover if he proved his case by a preponderance of the evidence; nothing more than a preponderance was required (*Leggett v. Ills. Central R. R.* 72 Ill. App. 572-579); and it need preponderate in his favor but slightly. *Donley v. Dougherty*, 174 Ill. 582.

In instruction four the jury was told that "if the plaintiff has proven his case by such evidence as satisfies and produces a conviction in the minds of the jury then he has proven his case by a preponderance of the evidence." That degree of proof is greater than is required of appellee by law. (*Leggett v. Ills. Central R. R.* 72 Ill. App. 572-580; *Brady v. Mangle*, 109 Ill. App. 172, 175) and could have done appellant no harm.

It was error to admit evidence to the effect that after service of the replevin writ, and the hogs had been taken to appellee's farm, they appeared to be familiar with the farm and with other hogs there but such error is not of sufficient importance to justify a reversal of the judgment in this case.

The question of fact, as a whole was fairly pre-

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sented to the jury that returned the verdict upon which the judgment appealed from was rendered and such verdict is amply supported by competent evidence.

In the case of *Bates v. Danville Street Railway & Light Co.*, 190 Ill. App. 486, (approved in *Jennings v. Estate of Glover*, 214 Ill. App. 359, 364) this court said "It is urged that the verdict is contrary to the evidence. Two juries have passed upon the facts of this case, each finding in favor of appellee. After the first trial, the court set aside the verdict and granted a new trial. While the evidence is conflicting, two juries have heard it, and where several juries have found the facts the same way and there is evidence in the record tending to sustain their verdicts, the judgment will not be reversed upon the facts. *Parmly v. Farrar*, 204 Ill. 38".

Judgment affirmed.





Gen. No. 7285

Ag. 64

October Term, A. D. 1920

Etta Harlan, Appellee.

vs.

S. F. Scheffer, Appellant.

221 I.A. 667

Appeal from the Circuit Court of Vermillion County.

WAGGONER, J.

The evidence in this case shows that an oral agreement was entered into by the parties, to this suit, whereby appellant was to pay appellee \$75.00 if she sold or sent him a purchaser for either of two houses owned by him on Collett street in the city of Danville. In pursuance of the terms of such agreement appellee showed one of the houses to John M. and Lulu May Burris; and had them wait, in the house shown them, until she could get the appellant to come there. She immediately telephoned to appellant's office and to his home to advise him of the situation. He came and appellee met him in the yard and told him the Burris's were in the house waiting. He talked with them in the house, again at his office and afterwards a written contract was entered into by him, with John M. and Lulu May Burris, whereby he sold one of the houses to

Page 1

the last two named persons who agreed to pay him \$3000.00 for it.

As part payment of the purchase price appellant was to take a Ford Touring car at \$300.00, and the remainder of it was to be paid in money in installments. The purchasers delivered the car to appellant and went into possession of the property bought by them.

Appellee brought suit on her contract with appellant and this appeal is from a judgment against him for \$75.00 and costs.

A number of errors are assigned on the record, but the greater number of them are not argued and are therefore waived. International Harvester Co. v. The Industrial Board 282 Ill. 489, 492.

The errors argued are that the court erred in not allowing appellant's motion made at the close of appellee's evidence, to direct a verdict and in refusing to give appellant's instruction numbered five.

It is urged that when appellee rested her case there



had been no evidence offered, on her behalf, to show that, the

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property described in the contract offered in evidence by her, between appellant and John M. and Lulu May Burris was the property appellee had been authorized to sell or find a buyer for; that appellee, in her testimony, had described the property as being No. 725 Collett street while the contract described it as being lot ten and eight feet off the north side of lot nine, in Joseph Young's addition to Danville, Vermillion County Illinois. Appellee did refer to the property as being No. 725 Collett Street, Danville, Illinois, as shown by the abstract but in addition thereto in a part of the record not abstracted, it appears that she showed the parties the house in question; that she had them remain in the house in question until appellant came; that she met appellant "out in the yard and told him the Burris's were in the house waiting on him" and that "they were not in my house but in the house in question." Appellee further testified that two or three days after the house was sold appellant called over the phone "and asked me how much or how soon I was expecting him out there to make this settlement" to which inquiry appellee jokingly replied "in five minutes time" and appellant said "I could not crank my machine in that time."

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It is true that appellee, on cross examination, could not or did not give a description of the property as set out in the written contract but it is idle to contend that a verdict should have been directed against her on account of her inability to describe it otherwise than as she did. To have described it as the property in question was sufficient to prevent the case being taken from the jury. In addition to that, when the contract was offered in evidence one of the counsel for appellant stated specifically there was no objection to it. No error was committed, by the court, in refusing to direct a verdict.

By making a motion to take a case from a jury and to instruct them to find for the defendant, the maker of such motion admits the truth of all opposing evidence and all inferences which might be fairly and rationally drawn from it. Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 150.

The evidence shows that, at the time the contract of sale of the property was made, a remainder of \$115.00





of the purchase price of the car was unpaid to A. E. Schafer from whom John M. Burris bought it; that Schafer replevined it from

Page 4

appellant, who paid the claim and the car was returned to him. The contract, for the sale of the property, was not repudiated on account of the existence of any claim on the car but such claim was removed by payment being made. Apparently there was a writing of some kind between A. E. Schafer and John M. Burris in reference to the car but it does not appear in the record and consequently we do not know its contents. The writing probably would disclose what right or title John M. Burris had to the car. Appellee's right in this case cannot be effected by any statements made out of court by either John M. Burris or his wife in regard to the ownership of the car made subsequent to the execution of the contract by them.

Under the evidence it was not error to refuse to instruct the jury, as asked in instruction five, that if John M. and Lula May Burris did not own or have title to the car, at the time of the execution of the contract and did not have the ability to get the title to the same appellee could not recover for any services she may have rendered in securing such parties to make such contract.

Appellee has been, on each of two trials of this case,

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awarded a judgment of \$75.00. She did not file a brief in this court and instead of reversing the judgment pro forma on the call of the docket, as could have been done under a rule of this court, on an examination of the record we deemed it proper to decide the case upon its merits.

The record discloses no reason for reversing the judgment and it is therefore affirmed.

Judgment affirmed.

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(1782a)

General No. 7241.

Agenda No. 28.

October Term, A. D. 1920

Margaret M. Robinson, Appellee.

vs.

John B. Robinson, Appellant.

221 I.A. 667

Appeal from the Circuit Court of Shelby County.

Per curiam:—

This is a suit for seperate maintenance. The evidence establishes that both parties are to blame for their living separate and apart. The record shows disgraceful conduct on the part of each of them; one is as reprehensible as the other and neither are entitled to relief in a court of equity.

The decree, rendered in the circuit court, is reversed. The cause is remanded with directions to dismiss the bill of complaint without a judgment for costs. Each party should pay the cost made by them respectively in the circuit court and in this court.

Reversed and remanded with directions.



General No. 7224.

Agenda No. 14.

October Term, A. D. 1920

Crane Company, Appellant

vs.

C. E. Sparks, et al., Appellees

221 I.A. 667

Appeal from Circuit Court Vermilion County.

ELDREDGE, J.

In October, 1916, Joseph Dallstream made two contracts with C. E. Sparks, one of appellees, by one of which Sparks was to furnish all material and install certain plumbing, and by the other to furnish the material and install the heating plant in a flat building owned by Dallstream in the city of Hoopston, Illinois. Sparks purchased the material for this work from the Crane Company, appellant, which furnished the necessary materials from time to time until April 24, 1917, at which time appellant claimed a balance due from Sparks for materials furnished in the sum of \$373.17. On May 1, 1917 the flat building was ready for occupancy and the several apartments therein were rented to various tenants by Dallstream. On June 22, 1917, appellant filed its claim for a mechanic's lien on the premises for the sum of \$373.17. The itemized account attached to the affidavit for the lien showed that the last materials were furnished by appellant on April 24, 1917. On December 11, 1917, more than seven months after the last of the materials were furnished by appellant the latter filed

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its bill in the Circuit Court of Vermilion County to foreclose the lien. Dallstream in his answer to this bill among other things set up the defense that appellant was not entitled to its lien because it had not commenced its suit to enforce it within four months after the time the final payment was due appellant as provided by section 33 of the Mechanic's Lien Act, Chap. 82. Hurd's R. S.

On June 13th, 1918, more than thirteen months after the last material was furnished by appellant for which the lien was attempted to be foreclosed by the above mentioned bill, appellee shipped a bill of goods amounting to \$29.51 to Sparks who without the con-





sent or knowledge of Dallstream installed the material, which consisted of some asbestos covering for steam pipes, a closet bowl, and connections, in the basement of the flat building. On August 8, 1918, appellant served a new notice on Dallstream for a mechanic's lien which included this item of \$29.51 in and by which notice it is alleged that the last material furnished for said building was on July 22, 1918, and claimed the amount due at the sum of \$409.46. On September 26, 1918, appellant filed the present bill against Dallstream to foreclose a lien upon the premises claiming the amount due to be \$402.68, in conformity with the last mentioned notice for lien, and on October 7, 1918 it dismissed its former bill. Appellee Dallstream answered this bill and the

Page 2

cause was referred to the Master in Chancery to take the proofs and report his findings of law and fact. Dallstream testified before the Master, but shortly thereafter died and the executors of his will together with the heirs, legatees, and devisees were made parties to the bill. The Master found that the work was completed on the building July 30, 1918, and that there was a balance due of \$409.46, and that appellant within 60 days after the conclusion of said contract served upon Dallstream its notice for a lien and recommended that the lien be established and foreclosed as prayed in the bill. Objections were filed by appellee to this report which were made exceptions to the same in the Circuit Court. The Chancellor sustained the exceptions and dismissed the bill for want of equity.

It is apparant that the Chancellor took the view that the placing of the few items of materials in the basement of the building by Sparks in 1918, which was more than thirteen months after the last material had been furnished by appellant before that time, was simply an attempt to revive a lien which had lapsed by limitation, and we think this conclusion is sustained by the evidence. The building was occupied by tenants on May 1, 1917. The evidence does not show that Sparks did not understand that he had fully completed his contract at that time. The furnishing of the small item of materials amounting to \$29.50 by appellant to Sparks thirteen months afterwards and the placing of the



same by Sparks in the building without the knowledge or consent of Dalstream strongly tends to show that this action was but a subterfuge in an attempt to revive the original lien. The evidence supports the view taken by the Chancellor and the decree is affirmed.

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1765a  
Genrael No. 7268.

Agenda No. 50.

October Term, A. D. 1920

Charles McClear, Appellee

vs.

Norman Laundry & Dry Cleaning Co., Appellant.

221 I.A. 667

Appeal from Circuit Court Macon County.

ELDREDGE, J.

Appellee recovered a judgment for \$800.00 damages in an action on the case against appellant for injuries received by being struck by an automobile truck negligently operated by one of the employees of appellant.

Prairie Street in the city of Decatur runs east and west, and at the point of injury it is intersected at right angles by an alley 15 feet in width running north and south. The accident occurred in a closely built-up business portion of the city. The evidence for appellee tends to prove that on November 21, 1918 he was walking east on the north side of Prairie Street and had taken about three steps across the alley when appellant's truck, which also approached the alley from the east on the north side of the street and more or less behind appellee and going at a rate of speed variously estimated by the witnesses as between 8 and 30 miles an hour without giving any warning signal, turned north into the alley, struck appellee and pushed

Page 1

him against a sign board on the front of the building, driving the spring shackle of the truck through the calf of his leg. The verdict is sustained by the clear and manifest weight of the evidence and under such circumstances it will not be set aside unless upon the whole record it is found that appellant has been deprived of some fundamental and substantial right which has resulted in its failing to receive a fair and impartial trial. The fourth instruction given on behalf of appellee tells the jury that the preponderance of the evidence in a case is not determined alone by the number of witnesses testifying to any fact or facts, but in determining where the preponderance is the jury should take into consideration certain other elements. The criticism of this instruction is that it in fact instructs the jury that they should



not consider the number of witnesses testifying as one of the elements in determining what constitutes a preponderance of the evidence. This instruction has been criticised many times (Lyons vs. Ryerson & Son, 242 Ill. 409; Yanloniz vs. Spring Valley Coal Co. 185 Ill. App. 563; in the matter of Dunning, 211 Ill. App. 633; Rynearson vs. McCartney, 203 Ill. App. 555; DeJoannis vs. Domestic Engineering Company, 185 Ill. App. 271.) and has also been either approved or held not to constitute reversible error in a number of cases (Lyons vs. Chicago City Ry. Co. 258 Ill. 75; Chenoweth vs. Burr, 242 Ill. 309; E. J. & E. Ry. Co. vs. Lawyer 229

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Ill. 621; Deering vs. Barzak 227 Ill. 71; Chicago Union Traction Co. vs. Marus, 221 Ill. 641; Illinois Steel Company vs. Rysca 200 Ill. 280.) Under the facts as presented by the record in this case the giving of this instruction does not constitute reversible error.

The 7th and 8th instructions given for appellee are based upon the statute as it existed in 1918 at the time of the accident. It is urged by appellant that this act was repealed by the Motor Vehicle Law of 1919 without a saving clause, and the law applicable to the case must be governed by the law of 1919, and therefore the 7th and 8th instruction were erroneous. No new law will be construed to repeal rights accrued before the new law takes effect. Secs. 2 & 4, Chap. 131 R. S.; Eaton vs. Marion County Coal Company, 257 Ill. 567.

The criticism of the 9th instruction is without merit.

The witness, Post, who claimed to have seen the accident, without any preliminary qualifications as an expert, was asked this question: "A car going six miles an hour how far would it take to stop that car under ordinary conditions?" He answered that it could be stopped almost instantly within three feet. This evidence was wholly improper as he had not qualified as an expert and his attention was not directed to the car which struck appellee, but applied to any car, regardless of its weight, construction or power, or the conditions prevailing at

Page 3

the time, but the error is not one



of sufficient gravity to cause a reversal of the judgment.

It is finally urged that the damages are excessive. The question of damages was a question of fact for the jury to determine from the evidence, and we find no substantial reason for interfering with their judgment in regard thereto.

The judgment of the Circuit Court is affirmed.





(1766a)

General No. 7276.

Agenda No. 58.

October Term, A. D. 1920

Alexander B. Haenny and Albert J. Haenny,  
Executors of the last will and testament of  
Jacob R. Haenny, deceased, Defendants in Error

vs.

221 I.A. 667

Walker D. Hines, Director General of Railroads  
and Director General of the Toledo, St. Louis  
and Western Railroad Company,  
Plaintiff in Error.

Error to the Circuit Court of Montgomery County.

WAGGONER, J.

The writ of error in this case is prosecuted to reverse a judgment of \$1043.00 recovered by defendants in error, as executors of the last will and testament of Jacob R. Haenny, deceased, who was struck by a freight train and killed when attempting to walk across the track of the railroad company at a street crossing in the village of Coffeen, Illinois.

At the time of the accident cars were being switched. There were three cars behind the locomotive, several in front of it, and no employee of the railroad company on the head end of the train nor at the crossing. Immediately prior to the accident Jacob R. Haenny was standing in the center of the street ten or twelve feet from the track, and about twenty five feet from the walk on

Page 1

the east side of the street, engaged in conversation with Walter Green. After talking together a few minutes they separated. Green walked away from the crossing and Haenny walked towards it. The evidence shows that while these men were together the train was standing on a side track a short distance from them in plain view, and that decedant looked towards it. On the question as to whether or not a signal was given before the train was started towards the crossing, where the accident occurred, the evidence is conflicting. The conductor had left his train and gone to a barber shop. It is conceded, in the argument of this case, that defendant in error established negligence on the part of the railroad company in failing to give signals or



warning of the approach of the train but plaintiff in error contends the evidence shows that decedant was a trespasser on the right-of-way of the railroad company and was not on the crossing when struck; that the record is barren of any evidence to show that he was in the exercise of care and caution for his own safety and that such lack of care contributed to the cause of his death.

No complaint is made of any ruling of the trial court in admitting or refusing to admit evidence offered nor in giving or refusing to give instructions.

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Where the deceased was at the time he was struck by the train and whether or not he was in the exercise of ordinary care were questions of fact to be determined by the jury and under the evidence contained in the record we would not be justified in setting aside their findings in that regard.

Judgment affirmed.





1767a

GENERAL NO. 7264

AGENDA NO. 47

OCTOBER TERM, A. D. 1920

221 I.A. 668

Home State Bank of Lexington, Illinois, Appellee

vs.

James W. Vandolah, Ella E. Vandolah, and Brittania Vandolah, Appellants

Appeal from Circuit Court McLean County

PER CURIAM

James W. Vandolah was indebted to appellee on three promisory notes, one for \$2,000.00, dated September 21, 1909, one for \$500.00, dated September 26, 1909 and one for \$2500.00, dated October 2, 1909, and the latter took judgment thereon by confession in the aggregate sum of \$5542.50 on April 13th, 1911, and on this same day filed a creditor's bill against said James W. Vandolah, Ella E. Vandolah his wife, and Brittania Vandolah his mother, to set aside certain fraudulent conveyances executed by the said James W. Vandolah to his wife and mother and to subject the premises conveyed to the payment of said judgment. The cause was referred to the Master in Chancery, who, having heard the proofs, recommended that the bill be dismissed for want of equity, but the Chancellor, upon a hearing, sustained exceptions to the Master's report and entered a decree setting aside certain conveyances insofar as necessary to subject the real estate, fraudulently conveyed, to the payment of the

Page 1

judgment.

David H. Vandolah, the husband of Brittania, died intestate in 1903, leaving him surviving Brittania, his widow, and two sons, James W. Vandolah and L. S. Vandolah as his only heirs at law. At the time of his death David H. Vandolah owned about 1600 acres of farm land in McLean County and also certain real estate in the city of Lexington, in said county. After his death and until October 14, 1909, his widow and sons farmed these lands jointly and out of the income derived therefrom purchased 264 acres of other land in said county. Prior



to October, 14, 1909 and prior to the time when James W. Vandolah became indebted to appellee, the latter, together with Charles P. Scrogin and A. V. Peirson were operating the Williamsville, Greenville & St. Louis R. R. in Wayne County, Missouri, and were engaged in selling hardwood lumber, railroad ties, barrel staves, and also in mining and shipping iron ore, and were in debt several hundred thousand dollars and all were insolvent in February, 1910, as is shown by the return of executions on judgments against them "no property found." At this time also James W. Vandolah was indebted on notes to twenty persons other than appellee in the aggregate sum of \$80,000.00 The proofs shows conclusively that on October 14, 1909, the date when

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the first deed in question was executed, James W. Vandolah was heavily burdened with debts, if not actually insolvent. At this time James W. Vandolah and his brother L. S. Vandolah were the owners in fee of 1608 acres of land and the properties in Lexington subject to the dower interest of their mother, Brittanah Vandolah. They and their mother were also the owners of the 264 acres in equal shares, purchased from the income derived from the other lands, making a total acreage of farm lands, in which they all had an interest, of 1872 acres. On the date last mentioned, a division of the properties was made and James W. Vandolah and his brother conveyed the fee-simple title to their mother to 656 2-3 acres of the land mentioned, the deed reciting a consideration of \$1.00 and love and affection. This deed was filed for record November 18, 1909. On December 10, 1909 they also conveyed to her in fee-simple for the same named consideration the city properties in Lexington, Illinois. The remaining 1200 acres were divided between James W. Vandolah and his brother by deeds and in which their mother released her dower. Under this division James W. Vandolah acquired title of 617 acres, on which he placed a mortgage of \$80,000.00 on February 21, 1910 to secure the twenty creditors heretofore mentioned. This mortgage was subsequently foreclosed

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under a decree for strict foreclosure without redemption.

The Chancellor found that the valuation of all the properties mentioned in October 1909 was \$265,000.00. He also found that the value of the properties deeded by James W. Vandolah and his brother by their deeds of October 14, 1909 and December 10, 1909 to their mother was \$92,000.00, while the interests their mother conveyed to them in the remaining properties were of a value of but \$50,000.00, and that one-half of this excess of \$42,000.00 in the valuation was a gift to her from James W. Vandolah and a fraud as against his creditors.

The 656 2-3 acres of land deeded to the mother by the deed of October 14, 1909 embraced a tract which is designated in the testimony as the Bray farm, consisting of 120 acres. This farm was owned by S. W. Bray, the father of Britannia Vandolah, when he died in 1896 leaving nine heirs. Britannia Vandolah thus inherited a one-ninth interest in the farm. Her husband, David H. Vandolah, subsequently purchased the interests of the other eight heirs and consequently when he died he was seized in fee of the undivided eight-ninths of the farm, and Britannia the undivided one-ninth thereof. Upon his death, James W. Vandolah and his brother, each then became seized in fee of an undivided four-ninths, subject to the dower interest of their mother, Britannia Vandolah, therein. It is claimed by appellants

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that when David H. Vandolah purchased the undivided eight-ninths of the Bray farm he told his wife, Britannia, that that farm was to be hers, and that there was an oral executed gift to her of his undivided eight-ninths interest therein. Britannia Vandolah testified that her husband frequently referred to it as her farm, and that the rents from it were hers, and that she drew out of his bank account about \$200.00 a year for these rents, which amounted to about \$700.00 per year. Her husband, however, rented the farm in his own name, paid the taxes on it as his own, received the rents and income therefrom, and at one time offered it for sale. The evi-





dence shows that the rents and income derived therefrom were deposited in his common bank account with his other funds, and that his wife had authority to draw on this bank account as she saw fit. He never conveyed his interest to his wife but permitted the title to remain in himself. James W. Vandolah testified that he and his brother included this farm in the deed in question because his father had always intended to give it to her. The evidence failed to show more than that David H. Vandolah intended to at some time make a gift to his wife of his interest in the farm. The record title to an undivided four-ninths of the farm was permitted by Brittania and James W. Vandolah to remain in the

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latter for seven years, during which time the indebtedness of the latter had accumulated, and it cannot now be claimed that Brittania Vandolah owns the undivided four-ninths interest of James W. Vandolah to the prejudice of the latter's creditors. *Keady vs. White*, 168 Ill. 76; *Anderson vs. Armstead*, 69 Ill. 452; *Houk vs. Van Ingen*, 196 Ill. 20.

It is further contended that the decree erroneously set aside this deed because there had been an oral partition of the properties mentioned therein between Brittaniam, James W., and L. S. Vandolah, in 1908, a year prior to the time when the partition deeds were executed. The evidence is not clear and satisfactory that any actual oral partition was ever made. The proofs do not show that each party took possession of certain portions of said lands, but do show that an actual division thereof awaited upon the survey of the lands, which was not made until just before the deeds were executed. The proofs also show that up to a short time before the partition deeds were executed, the income from the lands was pooled between the mother and her two sons in equal shares, and that a part of such income was used to purchase other lands, the parties taking title thereto in equal shares. A parol partition is not consummated unless the co-tenants take possession of their respective tracts. *Manley vs. Pettee*, 38 Ill. 128; *Vasey vs. Board of Directors*, 59 Ill.



188; Vanbuskirk vs. Vanbuskirk, 148 Ill. 9; Duffy vs. Duffy, 243 Ill. 476. Even if the proofs showed an actual parol partition if the value of the dower relinquished is much less than the value of the property received, the deed should be set aside as to the excess at the suit of a creditor. Patrick vs. Patrick, 77 Ill. 555. It was held in the case of Synder vs. Partidge, 138 Ill. 173, "Where the consideration paid is small in comparison with the real value of the property and where the circumstances of the case are extremely unfavorable to the fairness of the transaction, though not sufficient to establish absolute fraud, the conveyance will be regarded as a voluntary one to the extent of the difference between the actual consideration and the real value of the property, and to that extent will be treated as fraudulent and void as to existing creditors." When such conveyances are made in good faith they will be sustained to the extent of the consideration actually paid and no further. Payne vs. Miller, 103 Ill. 442. While a conveyance between parties related to each other by blood or marriage does not, of itself, establish fraud in the transfer, the fact of relationship may be properly considered in connection with other evidence tending to impeach the transaction. Bartel vs. Zimmerman, 293 Ill. 154. The consideration received by James W. Vandolah in the partition was so grossly inadequate compared with the value of the property conveyed

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by him

that it made the transaction as to the excess of the valuation fraudulent as to his creditors.

On December 8, 1909 Brittanah Vandolah, James W. Vandolah and wife and Lewis S. Vandolah and wife, conveyed by warranty deed for the expressed consideration of \$7,000.00 certain lots in the town of Lexington, McLean County to one B. A. Franklin. On December 10, 1909, Franklin and wife, by his warranty deed conveyed the same lots to Ella E. Vandolah, wife of James W. Vandolah. The title to these lots at the time the first deed was executed was in James W. Vandolah, and the deeds were admittedly execute for the purpose of transferring this title to his wife. The decree also sets aside





these deeds because they were made without valuable consideration and were fraudulent and void as to appellee. On these lots was the home of James W. Vandolah which he built in 1893. In 1901 his wife requested him to make some improvements on the house, which he declined to do. She testified that he agreed that if she, out of her own means would make the improvements, he would deed the premises to her, and that she made improvements to the premises to the amount of \$1300.00. She also testified that her husband collected rents from lands which she had inherited from her father's estate and appropriated them to his own use and it is insisted that

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these facts constituted a valid consideration for this conveyance. The conveyance was not made until after the indebtedness to appellee had accrued. No note or other evidence of any indebtedness from him to her was ever given by him, and there is no proof that he ever promised to repay her any of the moneys collected by him. She testified that he deposited the rents collected by him from her lands to his own credit in his banking account and they were used for the support of the family as a common fund with his own and on which they both drew checks. Where a husband uses the property of his wife in his business or for the support of the family with her knowledge and assent a gift will be inferred in the absence of a contrary agreement. *Hauk vs. Van Ingen supra*. In the latter case the following quotation from the case of *Clark vs. Rosenbraus*, 31 N. J. Eq. 667 is cited with approval: "A claim by a wife against a husband, first put in writing when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties alone, uncorroborated by other proof, should be rejected at once, unless their statements are so full and convincing, as to make the fairness and justness of the claim manifest." It is apparent from the record that the indebtedness

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now claimed by the wife of James W. Vandolah is without substantial merit.

It is also claimed that when James W. Vandolah borrowed the \$80,000.00, to secure which he mortgaged the 617 acres which he procured upon the partition of the farm lands, he delivered the mortgage notes to Charles P. Scrogin, the cashier of appellee's bank for the purpose of distributing the same to the twenty creditors listed by him, that appellee was one of these creditors and therefore is now estopped to claim anything upon its judgment. The decree found and the proofs show without contradiction that appellee was not so listed as one of the creditors of James W. Vandolah and that when the mortgage notes were delivered to Scrogin, the latter was not cashier of the bank and had no connection with it.

The proofs fully sustain the decree entered by the Chancellor and it is affirmed.



175  
✓  
GENERL NO. 7271

AGENDA No. 53

OCTOBER TERM, A. D. 1920

Agnes Watts, Appellee

vs.

221 I.A. 668

A. I. Greenstone, Appellant

Appeal from Circuit Court Sangamon County

PER CURIAM

Appellee sued appellant before a Justice of the Peace to recover damages for injuries to the automobile of appellee caused by the automobile of appellant colliding with it. On an appeal to the Circuit Court of Sangamon County appellee recovered a judgment for \$166.48.

On the morning of May 2, 1919, Catherine Watts, 22 years of age, granddaughter of appellee and an experienced driver, was driving an automobile owned by appellee west on Cook street in the city of Springfield at a speed of about 10 miles per hour. As she was passing over the interstecction with Spring street, appellant's automobile, driven by his colored servant at a speed of from 35 to 45 miles per hour, came from the north and struck appellee's automobile just as it had succeeded in crossing the street. It is conceded by counsel for appellant that the driver of appellant's automobile was negligent but it is contended that the driver of appellee's

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automobile was guilty of contributory negligence for the reason that there was an ordinance of the city of Springfield which provided that automobiles going north and south at street intersections should have the right of way and that it was the duty of the driver of appellee's automobile, when she saw appellant's automobile approaching from the north, to stop and let it pass. The trial court refused to permit this ordinance to be introduced in evidence on the ground that it was immaterial. The proofs show that appellee's automobile had succeeded in wholly crossing the intersection before it was struck, and that the collision occurred because the driver of appellant's automobile, instead of keeping on a





straight course down the street, swerved into appellee's automobile after it had in fact crossed the intersection and was on the other side of Spring street. Moreover when appellee's automobile started across the intersection, appellant's automobile was a block away, or four hundred feet. The street was forty feet wide. An ordinance must receive a reasonable construction and the driver of appellee's car had a right to assume that the driver of appellant's car would not race down upon her at the rate of 40 miles per hour. If appellant's automobile had been driven at a lawful rate of speed appellee's automobile would have had

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ample opportunity to have crossed the street without any danger of a collision. The ordinance imposed no duty on the driver of appellee's car to stop and wait for an automobile four hundred feet distant to pass before she attempted to cross the street. If such a construction of the ordinance should obtain every driver of an automobile along a street running east and west when he came to the intersection of a street running north and south could never cross such intersection without being guilty of negligence if another automobile should be approaching the intersection from the north or south regardless of the distance it might be therefrom. Such a construction of an ordinance of this character would be wholly unreasonable. It was not erroneous for the court to refuse the admission of this ordinance.

It is urged that assuming the negligence of the driver of appellant's automobile was the sole cause of the collision, appellant, nevertheless, would not be liable because before and at the time of the collision his driver was acting outside of the scope of his employment, and was engaged solely in a project of his own. Without discussing the particular facts shown by the record this contention is answered by the testimony of appellant himself who testified: "Just prior to the collision,

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Charles Hutchinson was working for me. I authorized him to drive the automobile. He had driven it before



under my instructions with my knowledge, and consent, and he was driving it on this occasion with my knowledge and consent and instructions."

The trial court modified appellant's eighth instruction to the effect that appellant would be responsible if the driver drove his car with appellant's permission only. This instruction as so modified was erroneous as the owner of an automobile is not liable for an injury done by a servant while driving the same when the latter is engaged solely in an enterprise of his own, even though he is using the automobile with the owner's permission. *Arkin vs.* Page 287 Ill. 420. The giving of this instruction, however, was a harmless error for the reason that the evidence conclusively shows that appellant's servant was driving the automobile upon the business and under the instructions of appellant and that the collision was wholly due to his negligence.

The judgment of the Circuit Court is affirmed.





1707a

GENERAL NO. 7274

AGENDA NO. 56

OCTOBER TERM, A. D. 1920

Maggie Crowe, et al, Appellants

vs.

221 I.A. 668

Modern Woodmen of America, Appellees

Appeal from Circuit Court Dewitt County

PER CURIAM

Maggie Crowe, Regina Corrington and Elsie Donohoo, appellants, brought an action of assumpsit against the Modern Woodmen of America, a fraternal beneficiary society, upon a benefit certificate issued to William Crowe. The certificate was issued October 29, 1897, and William Crowe died July 21, 1918. The certificate provides that appellants be entitled to participate in the benefit fund of the society to the amount of \$3,000.00, provided that all the conditions contained therein and the by-laws of the society, as the same then existed, or might be thereafter modified or enacted, should have been fully complied with. It also contains the following provision: "7. If said member shall enter upon or follow any of the employments or occupations mentioned in Section 13 of the by-laws of this society now in force or as hereafter amended this certificate shall, so far as the same is intended to provide for the payment of benefits, become **ipso facto**, null and void; provided, however,

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that said

member may, at the time of entering upon such prohibited occupation, by filing a waiver, as provided in Section 16 of said by-laws, keep this benefit certificate in force, except in respect to death resulting from accident occurring in, or disease directly traceable to, his employment in such extra hazardous occupation."

Section 13 of the by-laws existing at the time the certificate was issued prohibited any persons engaged in the occupation of railroad freight brakeman, freight conductor, locomotive engineer, fireman, or switchman from becoming beneficial members. Section 15 of the by-laws then provided that if the holder of any benefit certificate



shall thereafter enter upon any of the occupations mentioned in Section 13, without filing the waiver provided for in Section 16, he shall thereby forfeit all right as a beneficial member, and his certificate shall become null and void. Section 16 provided that any holder of a benefit certificate might enter upon any of the occupations mentioned in Section 13 without invalidating his certificate, if, at the time of entering upon such occupation, he should file with the head clerk a waiver of any liability by reason of his death resulting from any accident occurring in or any disease directly traceable to his employment in such occupation.

Amended by-laws were enacted and in force July 15, 1905.

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Section 17 of said amended by-laws provided that engaging in, or entering on, or continuing in any of the occupations above mentioned by any beneficial member theretofor and thereafter admitted to such membership, shall totally exempt said society from any and all liability to such member or his beneficiaries, on account of the death of such member directly traceable to employment in such hazardous occupation. Section 18 of the amended by-laws provided that any member having entered upon any of the said occupations who might desire to extend his certificate to cover the hazards of such occupation might make application therefor and pay the increased rate therein mentioned.

Further amendments to the by-laws were enacted and in force September 1, 1917. The provisions of section 17 of the amended by-laws of 1905, however, were not materially changed insofar as any question here in controversy is concerned.

Appellee filed the general issue and also a special plea to the declaration in which the above by-laws and others are set out in **haec verba** and in which it is also averred in substance that William Crowe, on September 22, 1905, changed his occupation from that of laborer to that of railroad locomotive engineer and that thereafter on the 20th day of July, 1918,



while so engaged in the occupation of railroad locomotive engineer and in the performance of his duties as such, he was mortally injured by the locomotive on which he was employed striking certain freight cars on a side tracks, from which injuries he died July 21, 1918, his death resulting by reason thereof and being directly traceable to his employment as a railroad locomotive engineer; that said Crowe, at the time of his death, was engaged in an occupation classed as hazardous, and prohibited by the by-laws in force at the time he became a member, and at the time he engaged in said occupation, and at the time of his injury; that he did not hold a hazardous occupation certificate covering the hazards of his occupation, and that by reason of the facts aforesaid appellant was exempt from any liability on account of his death. To this plea appellees filed two replications which are substantially the same, and averred that appellant became informed and well knew that said Crowe was engaged in the business of a railroad locomotive engineer and still continued to receive and collect monthly dues and assessments from said deceased after acquiring said knowledge up to the time of his death, and that it still retained said money so collected. The court sustained a demurrer to the replications and appellants elected to abide by their replications, whereupon judgment **nil dicit** was

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rendered in favor of appellee.

It is the contention of appellants that a local lodge of a fraternal beneficiary society is the agent of the society and may waive the by-laws thereof by accepting dues and assessments with knowledge of facts constituting a violation of the same, and that the society or insurer cannot defeat the legal defense of waiver by after enacted by-laws waiving the right to declare a forfeiture; that the insurer must either forfeit the certificate, waive the forfeiture, or classify the deceased as to the greater risk. This contention cannot be held to apply to the facts shown by the plea. The certificate in this case specifically provides that the contract for insurance shall be composed of the application, the certificate, and the





by-laws. It also provides that the insured shall be bound by after enacted by-laws. Such after enacted by-laws have frequently been held to be valid and binding. Pold vs. North American Union, 261 Ill. 233; Royal Arcanun vs. McKnight, 238 Ill. 349; Scow vs. Royal League, 223 Ill. 32; Murphy vs. Nowak, 223 Ill. 301; Baldwin vs. Begley, 185 Ill. 180; Fullenwider vs. Royal League, 181 Ill. 621; Garrity vs. Catholic Order of Forresters, 148 Ill. App. 189; Apitz vs. Supreme Lodge, 274 Ill. 196; Pride vs. Switchmen's Union, 178 Ill. App. 434.

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It is alleged in the plea and admitted to be true by the demurrer that Crowe changed his occupation to that of railroad locomotive engineer on the 22nd day of September, 1905. At this time the amended by-laws of July 15, 1905 were in force. Section 17 thereof then provided in substance that a beneficiary member might change his occupation to that classified as hazardous without destroying the validity of his certificates, except in case that his death be directly traceable to such hazardous occupation. If he should die from any other cause there remained a full liability under this certificate. Under the by-laws which existed at the time the certificate was issued to Crowe if he should change his occupation to a prohibited hazardous one, then the certificate became absolutely void, unless he filed the waiver heretofor mentioned. The effect of the amendment of July, 1905, was simply to abolish the necessity of filing the waiver. Section 18 of the by-laws in force July 15, 1905 provided also that if the insured desired to engage in a prohibited hazardous occupation, he could extend his certificate to cover the hazards of such occupation by paying certain increased rates. Both these by-laws were beneficial to the insured and were in force when Crowe changed his occupation to that of locomotive engineer, and their effect was not materially changed by those sub-

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sequently enacted. Under these circumstances the doctrine of estoppel or waiver contended for by appellant can have no application because



at the time Crowe changed his occupation and during all the time he remained locomotive engineer, which was until his death, no by-law existed which appellee could waive and thus inject vitality into the certificate. Crowe had a right under the by-law that existed at the time, he changed his occupation to engage in a prohibited, hazardous occupation, and his certificate would remain in full force and effect as to all causes of death except those directly traceable to such hazardous occupation and the acceptance of his dues by the local lodge did not waive any rights of appellee which are involved in this case.

The judgment of the Circuit Court is affirmed.





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GENERAL NO. 7277

AGENDA NO. 59

OCTOBER TERM, A. D. 1920

Mina McClure, Appellee

vs.

Hoopeston Gas & Electric Company, Appellant

Appeal from Circuit Court Vermilion County.

PER CURIAM

Appellee recovered a judgment against appellant in the Circuit Court of Vermilion County for the sum of \$3200.00 in an action on the case for damages arising from a fire which partially destroyed an apartment building and certain personal property located therein owned by her.

Appellant is a corporation located in the City of Hoopeston, and engaged in the business of furnishing electricity and gas for commercial purposes to the inhabitants of that city. The original declaration consists of one count which charges that appellant had connected with the building of appellee pipes for the purpose of furnishing gas therefor and had the custody and control of the pipes and connections carrying the gas into and upon the premises of appellee; that the gas was highly inflammable and volatile and it was the duty of appellant to use a high degree of care to prevent it from escaping

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from the pipes, fixtures and connections upon the premises; that appellant negligently permitted a certain connection on a certain pipe to become loose and defective, whereby the gas was permitted to escape into the ground floor of the premises and that appellant had notice of the escape of such gas or by the exercise of reasonable care on its part could have ascertained the leakage thereof; that by reason of said leakage from said defective pipe the gas became ignited and caused the building to catch on fire.

The first additional count omits the allegation that appellant had the custody and control of the pipes on the premises but alleges that it had the right of ac-

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cess to the same for the purpose of making repairs and that on January 15, 1919, it installed upon the premises, in connection with the pipe through which the gas was carried, a certain gas meter, that the connection of said meter with the pipes was negligently made and allowed gas to escape into the building, and though often notified and requested, appellant failed and refused to repair the pipes and connections by reason whereof the escaping gas became ignited, causing the building to catch on fire.

The second additional count omits the allegation that appellant had the control and custody of the gas pipes located on

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the premises but charges that it had access to said pipes for the purpose of examining, inspecting and repairing the same; that it was its duty to use a high degree of diligence in repairing the pipes that were defective and allowed gas to escape; that at or near the meter installed by appellant a pipe through no fault of appellee became loose and permitted gas to escape and that appellant was notified thereof and negligently failed to repair said leak, whereby without fault on the part of appellee the gas became ignited, and caused the building to catch on fire.

The third additional count also omits any allegation that appellant had the custody and control of the pipes upon the premises but avers that it at all times had access to all pipes for the purpose of inspecting and repairing the same, and that it was the duty of appellant to use a high degree of care to keep its pipes upon said premises in a safe condition so as to prevent gas from escaping and becoming ignited; that in January, 1919, appellant installed on said premises pipes and meters and so carelessly and negligently made the connections and installed said pipes and meters that gas was allowed to escape and leak therefrom into the building and though notified and requested it failed and refused to repair said pipes.

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The building in question was three stories high and



there were four four-room apartments on each floor. A small air shaft about fourteen inches square ran up through the center of the building and connected with other apartments. Appellee, her husband and daughter occupied the south apartment on the first floor. The air shaft in this apartment ran up through a closet opening into the kitchen. In this closet was located a gas meter connected with a gas stove. Pipes connecting with the gas main in the street ran through the building and in each apartment a pipe connected the main pipe with the gas meter therein, which was in turn connected with what is called a hot plate. Each apartment thus had its own meter and the tenant thereof paid for the gas consumed therein. Payments for the gas consumed were made on the slot principle, that is, each meter was provided with a slot wherein a twenty-five cent piece was dropped, and when twenty-five cents worth of gas had been consumed the meter automatically shut off any further gas until another twenty-five cent piece was dropped in the slot. Once a month an inspector for the gas company collected the money out of each meter. The evidence for appellee tends to show that when this gas equipment was installed in the building it was made with the agreement that if appellee would place a gas plate or stove in each

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apartment appellant would install the necessary pipes, meters and connections therewith without charge and that no charge was ever made by appellant for any part of the gas equipment in the building except for the hot plates and the stoves. The apartment occupied by appellee and her family originally had a hot plate therein, but about a year before the fire a gas stove was substituted for the plate.

The evidence also tends to show that after the gas equipment was installed in the building, appellee, or her husband who was acting for her, was informed by some officer of appellant never to attempt to repair the pipes or meters in the building. There was also evidence tending to show that for about a year prior to the time





of the fire there was a leakage of gas more or less in several of the apartments, of which appellant was notified, but which its inspectors could not locate.

On the 16th day of August, 1919, appellee and her husband arose in the morning at about half past five o'clock. They both noticed a strong odor of gas. Mr. McClure discovered escaping gas at the junction of the meter with the pipe which connected the meter with the gas stove. When he touched this spot with a lighted match a flame was created four or five inches long. He put the flame out and appellee also lighted the gas at the point of the leak

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with a similar result. She put out the flame and proceeded to cook the breakfast. McClure attempted to communicate with appellant by telephone, but was unable at that early hour to get any connection with appellant's office, and it was not until about seven o'clock that he was able to do so. When he did get into communication therewith he inquired for Mr. Austin who was general manager of appellant, but the latter being out of town, his son, who was also employed by appellant, answered the call. There is some conflict in the evidence as to what was actually said by McClure at this time. Austin testified that McClure said that he was having the basement excavated and that he wanted the pipe changed so it would be out of the way for the excavation; that he wanted it done that day if possible and if not he would explain it over the 'phone and appellant could do it the next week; that after explaining what he wanted done with the pipe in the basement he said he had a gas leak close to the meter, and that it shot a flame out about two or three inches when he touched a match to it; that if they were too busy he could fix it himself if he had a wrench. McClure testified that he simply informed Austin of the leak in the pipe and requested him to send someone out to fix it right away, and did not mention the matter of changing the pipes in the basement

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at that time. He is



evidently mistaken as to this, because a tenant of one of the apartments in appellee's building and a witness produced by appellee heard McClure's part of the conversation and testified that he at that time also requested the person he was talking to over the telephone to also fix the pipes in the basement at the same time. McClure testified that he was told over the telephone that the men could not come out that day as they had some other work which they would have to finish and they could not get out there until the next day.

Appellee herself had left the building at half past six that morning and after McClure had telephoned to the office of appellant he personally went to the office and had a conversation with Davis, one of the employees there, and testified that he told Davis about the leak where the meter joined onto the pipe and that it ought to be fixed at once; that Davis said it probably needed a new gasket and that he could not come out to fix it until about 9 o'clock; that he told Davis also that while they were there he wanted them to change the main gas pipe in the basement. The gas office was about seven blocks from the apartment building and the fire occurred while McClure was on his way back to the building and had proceeded about half the distance. The witnesses for appellant fixed the hour of the fire at about eight o'clock while

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McClure testified that it occurred about a quarter of nine. Davis testified that when McClure came to the office that morning he told him that he had a small leak out there and that he wanted some pipe changed under the floor so he could dig out the basement, that he wanted the work done that day while he could be there as he was out of town every other day, that he said he had a small leak around the meter connection about three or four inches long; that he, Davis, told McClure that they had a lot of work ahead but that he would go out there and fix the leak right away; that just as he and the witness Krager got their tools ready to go to the apartment the fire whistles blew and they jumped into an automobile and went out to the building where





they shut the gas off in the main pipe. In this he is corroborated by the witness Krager who was present during the conversation.

At whatever time the fire may have occurred it happened within a very few minutes after McClure had left the gas company's office.

McClure admits that he requested the employees of appellant when he was at the office to make the changes in the pipes in the cellar and the weight of the evidence is that he also made this same request over the telephone. Davis testified that McClure

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appeared more anxious to have them go out and make the changes in the pipes in the basement than he was to have them fix the leak, and McClure does not deny that he said he could do it himself if he had a wrench. The fire started in the closet in the apartment occupied by appellee where the gas stove was located, and shot up the air shaft to the apartments above, doing considerable damage. The evidence on behalf of appellee tends to show that no one was in her apartment when it caught on fire, and that there was no fire burning in the gas stove nor anywhere else in the apartment at the time the fire started, though there were fires burning in stoves in several of the other apartments. There is no evidence of any kind tending to show how the escaping gas became ignited. Both McClure and appellee, the only occupants of the apartment that morning, testified that after the breakfast had been cooked the fire in the gas stove had been turned out and McClure testified that when he left the apartment to go to appellant's office that morning there was no fire burning in the stove nor in any other place in the apartment. There is no evidence to the effect that gas of this character would ignite by spontaneous combustion.

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It is a matter of common knowledge that illuminating gas is a dangerous commodity not only on account of its highly explosive quality and its susceptibility to ignition, but also on account of its poisonous character which is destructive of life of every kind. A company which manufactures gas and conducts it through pipes for the



purpose of distribution and sale to customers is bound to use a high degree of skill and care on account of its dangerous qualities and the rules of ordinary care with respect to its transmission and the repair of leaks must be adjusted by a standard of care proportionate to its known dangers. *Marshall Window Glass Co. vs. Cameron Light & Gas Co.*, 63 W. Va. 202; *Morgan vs. United Gas Improv. Co.* 214 Pa. 109; *Shirley vs. Consumer's Gas Co.*, 215 Pa. 399; *Sipple vs. Laclede Gas Light Co.* 125 Mo. App. 81; *Greaney vs. Holyoke Water Power Co.* 174 Mass 437. If a leak in a gas pipe occurs without fault of the gas company then it will not be liable until it has been notified and a reasonable time has elapsed after such notice in which to make repairs, but it must respond with reasonable promptness, considering the exigencies and circumstances of the case for the purpose of making repairs. *Morrison vs. Superior W. A. L. & P. Co.* 134 Wis. 167; *Rockford*

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*Gas Light & Coke Co. vs. Ernest* 68 Ill. App. 300; *Aurora Gas Light Co. vs Bishop* 81 Ill. App. 493.

The evidence shows that appellant was notified of the leak and its extent shortly after seven o'clock that morning; that appellant kept a "trouble wagon" for the in repairing leaks and other emergencies, which was available at the time it received the notice; that servants of appellant, whose duty it was to repair leaks, were in the office at the time the notice was received; that the apartment building was but seven blocks from the office and could have been reached within five or ten minutes; that it would not have taken over five or ten minutes to have repaired the pipe; that there was no reason why the repairs should not have been made and the leak stopped immediately after the notice thereof had been received. The servants of appellant were fully aware of the danger of permitting such a leak to continue and it was their duty to repair it within a reasonable time after receiving notice thereof. What was a reasonable time under the circumstances was a question of fact to be determined by the jury, and this, re-



gardless of whether the company owned and controlled the particular piece of pipe in which the leak occurred or not.

The only criticism of the first instruction given on behalf

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of appellee is that it fails to embody the rule of due care on the part of appellee. The instruction states but an abstract proposition of law defining the duty of a corporation furnishing illuminating gas to use reasonable care and diligence to see that its pipes and other apparatus used to carry the gas upon premises of others is in a reasonably safe condition. Other instructions given fully inform the jury that if appellee or her husband were guilty of any negligence which contributed to the injuries complained of that she could not recover. The objections to the other instructions given on behalf of appellee are to the effect that they leave it to the jury to determine what the allegations of the declaration are. The instructions taken as a series gave to the jury sufficient information in that regard. Complaint is also made to the modification of the thirteenth instruction given on behalf of appellant. This instruction in effect told the jury that even if they believed appellant guilty of negligence that such negligence must be shown to be the proximate cause of the injury and if they further believed from the evidence that the injury was caused by the subsequent independent act of a third person the two were not concurrent and the existence of the condition caused by appellant's negligence was not the proximate

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cause of the injury. The court modified the instruction to make it read that the subsequent independent act of a third person must be a negligent act. This unquestionably was an erroneous modification but the instruction should not have been given at all as there was no evidence on which to base it and the error under the circumstances was a harmless one and should not cause a reversal of the judgment.

The judgment of the Circuit Court is affirmed.

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GENERAL NO. 7286

AGENDA NO. 65

OCTOBER TERM, A. D. 1920

W. J. Hacker, Appellant

vs.

Joseph P. Moore, et al, Appellees

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Appeal from Circuit Court Vermilion County

PER CURIAM

On June 10, 1919, appellant filed in the Circuit Court of Vermilion County an affidavit for attachment, to the effect that Joseph P. Moore was indebted to him in the sum of \$132.07, and that said Moore resided in Arkansas. An attachment writ was issued commanding the sheriff to make a levy upon the property of said Moore, and the same was levied upon two lots in the city of Danville, and the certificate of levy was filed with the recorder of deeds. Joseph P. Moore did not owe the debt and did not own the lots in question as the title of the property was in Ella Moore. Ella Moore, in September 1919, conveyed the lots by warranty deed to appellees, Herman Strebel and Viola Strebel as joint tenants for a consideration of \$1900.00. This deed was recorded September 29, 1919. On January 13, 1920 appellant obtained leave in the attachment suit to amend the affidavit, writ, certificate of levy, declaration and other papers in the suit by substituting the name of Ella Moore for that of Joseph Moore. After the

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certificate of levy was thus amended, it was refiled in the office of the recorder January 13, 1920. On January 31, 1921, Herman Strebel and Viola Strebel, by leave of court, filed their inter-plea in the attachment suit setting up the facts heretofor mentioned, and praying that the property be found to be that of the interpleaders, and that appellant have no interest in the same as against them. The court, after having heard the evidence, found that the property in question belonged to the interpleaders free from the attach-



ment lien.

It is the contention of appellant that there having been no personal service upon the defendant in the attachment suit, the levy of the attachment upon the lots was a proceeding *in rem* and that the Strebels were bound to take notice of the levy of the attachment writ and that amendments might be made in said proceeding. Unquestionably this rule would apply to all amendments curing defects in the proceedings but amendments of court records cannot be allowed to have a retroactive effect as against persons not parties to the original record. "The public is bound by the record of the court, and on the other hand it has the right to abide by it." *McCormick vs. Wheeler*, 36 Ill. 114. Until the amendments are actually made third persons can act upon nothing but the official record, and

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rights previously acquired are not affected by subsequent amendments. *Church vs. English*, 81 Ill. 442; *Wootters vs. Joseph*, 137 Ill. 113. The Strebels found from the record that the property in question was owned by Ella Moore, and that the attachment writ was levied on the property in a suit brought against Joseph P. Moore for a debt alleged to be owed by him, and who had no title to the premises in question. The amendments made in the attachment suit created an entirely new cause of action against an entirely different person. The rule as stated in 3 E. & A. Enc. of Law, 221 is as follows. "Insofar as the amendments set up a new cause of action, it only takes effect from the date of filing it as to persons acquiring a lien or interested in the property by purchase or attachment; for, as to the new cause, such persons are not **pendente lite** purchasers." The Strebels had a right to purchase the property upon the record as it stood at the time and their title thereto cannot be affected by the amendments. *Rabbit v. Weber & Co.* 297 Ill. 491.

The judgment of the Circuit Court is affirmed.

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